Case No. 10-55769
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARLA JAMES, WAYNE WASHINGTON, JAMES ARMANTROUT, CHARLES DANIEL DeJONG

Plaintiffs-Appellants,

v.

THE CITY OF COSTA MESA, CALIFORNIA, a city incorporated under the laws of the State of California; THE CITY OF LAKE FOREST, CALIFORNIA, a city incorporated under the laws of the State of California,

Defendants-Appellees,

On Appeal From An Order Of The District Court Denying Appellants' Request For A Preliminary Injunction
Central District of California
Hon. Andrew Guilford
District Court No. SACV10-00402 AG (MLGx)

RESPONDENT'S BRIEF OF DEFENDANT-APPELLEE CITY OF LAKE FOREST

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I.
INTRODUCTION

Appellee City of Lake Forest ("Lake Forest" or "the City") acknowledges the sincerity of Appellants' effort to employ the Americans with Disabilities Act ("ADA") to challenge Lake Forest's actions with respect to marijuana distribution facilities within the City's boundaries. As was demonstrated below and discussed here, however, Lake Forest acted solely within the confines of its legitimate zoning authority to combat the public safety threat to its citizens from marijuana distribution facilities. State law establishes the right of municipalities to employ their police power in the specific context of medicinal marijuana use.

The ADA does not provide Appellants the exemption they seek from that state law. Under the ADA, individuals engaged in illegal drug use fail to qualify as "individuals with a disability," with very limited exceptions. In their effort to obtain injunctive relief in the District Court, Appellants failed to establish that they fit within one of the exceptions to the ADA's definition of illegal drug use. Although they engage in a convoluted grammatical exercise in order to argue that the author(s) of the ADA intended to allow any individual with a recommendation for marijuana to satisfy the first of the exceptions, the District Court's far more straightforward interpretation possesses greater persuasive authority and should be

followed. In addition, a panel of this Court has already determined that the ADA does not require a reasonable accommodation for medical marijuana use.

Appellants' attempt to turn what is plainly a local matter involving the District of Columbia's medical marijuana initiative into the functional equivalent of national legislation also fails to enable Appellants to squeeze into the ADA exception for other authorized uses (of illegal drugs) under federal law. The District Court did not have the opportunity to rule on this particular argument, but Lake Forest contends that the claim lacks legal and persuasive authority. A municipal enactment under the Home Rule Act in the District of Columbia is not a federal statute, and the Equal Protection Clause does not entitle the California Plaintiffs to benefits of municipal laws of the District of Columbia.

Finally, the preliminary injunction Appellants seek against Lake Forest, enjoining proceedings before the California state courts, is prohibited by the Anti-injunction Act. Lake Forest respectfully submits that Appellants failed to establish a likelihood of success on the merits, and therefore the District Court's decision to deny the preliminary injunction should be affirmed.

II.

JURISDICTIONAL STATEMENT

This is an appeal from an order denying a motion for a preliminary injunction and is therefore reviewable pursuant to 28 U.S.C. § 1292, subdivision (a)(1).

III.

STATEMENT OF ISSUE PRESENTED FOR REVIEW[1]

Whether the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq*., provides Plaintiffs an exception from Lake Forest's land use regulations regarding marijuana dispensaries.

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[1] Appellants initially list five issues in their Opening Brief ("AOB"), pp. ix-xii. In their conclusion, they state the issues are "limited to whether the District Court properly interpreted 42 U.S.C. § 12210(d) and whether it properly considered Congress' action in the federal District of Columbia when analyzing whether the appellants were likely to prevail on the merits." (AOB, p. 56.) The only issue the Court addressed in its April 30, 2010 Minute Order was whether the "ADA . . . authorize[s], independent of the Controlled Substances Act, Plaintiffs' use of marijuana under a doctor's supervision." (Excerpts of Record ("ER"), Tab 1, p. 6.) Appellants have also discovered that the page breaks in their electronically-filed brief do match exactly the page breaks in their paper copy of the brief. The page citations to Appellants' Opening Brief in this Respondent's Brief are to the pages of the electronically-filed AOB.

IV.

STATEMENT OF THE CASE[2]

On April 2, 2010, Plaintiffs and Appellants Marla James, Wayne Washington, Charles Daniel DeJong, and James Armantrout (together, "Plaintiffs" or "Appellants") filed a complaint ("the Complaint") against the City of Costa Mesa, the City of Lake Forest, and DOES (1-58 counties located in California), and DOES (59-539 cities/towns incorporated in California) asserting one claim for violation of Title II of the Americans With Disabilities Act. (Excerpts of Record ("E.R."), Tab 4 [Docket # 1].) On April 6, 2010, Plaintiffs filed an Application for Temporary Restraining Order and Order to Show Cause re: Preliminary Injunction. (*Ibid.*, [Docket # 4, 5].) Defendants City of Costa Mesa and City of Lake Forest each filed Oppositions to the Application on April 7, 2010. (*Ibid*., [Docket # 6, 7].) By Minute Order dated April 7, 2010, the District Court denied Plaintiffs' Application and set a hearing on the Motion for Preliminary Injunction on April 26, 2010. (*Ibid*., [Docket # 10].)

On April 14, 2010, the City of Costa Mesa and the City of Lake Forest each filed a Supplemental Opposition to Plaintiffs' Application. (*Ibid*., [Docket #12,

[2] Although the Statement of the Case belongs in the Opening Brief, it was omitted. Appellee Lake Forest provides it here for the Court's convenience.

13].) Plaintiffs filed a Reply in support of a preliminary injunction on April 19, 2010. (*Ibid*., [Docket #14].)

On April 26, 2010, the District Court heard argument on its tentative ruling. (*Id*., Tabs 2, 4.) The District Court took the matter under submission. (*Id*., Tab 2.) On April 30, 2010, the District Court filed a Minute Order denying the preliminary injunction. (*Id*., Tabs 1, 4, [Docket # 21].) The District Court rejected Plaintiffs' argument "that the words 'illegal use of drugs' in Section 12210(a) do not apply to Plaintiffs' circumstances because their use of marijuana is recommended by doctors under the California Compassionate Use Act." (*Id*., Tab 1, p.5.) The District Court found that "[b]ecause marijuana cannot be prescribed under the ADA, [there was] no likelihood of success on the merits. With this finding, the Court need not reach the other elements listed in *Winters [v. NRDC, Inc.*], 129 S.Ct. [365,] at 374 (2008)." (*Ibid*., p.7.)

Plaintiffs filed their Notice of Appeal to this Court on May 14, 2010. (*Id*., Tabs 3, 4, [Docket # 22].) The same date, this Court filed an Order stating that Ninth Circuit Rule 3-3 applied because the appeal was from the denial of a preliminary injunction. (*Id*., Tab 4, [Docket # 26].) The Court of Appeals set a briefing schedule. (*Ibid*.) On July 2, 2010, a clerk's order was filed in response to a request by Defendants, granting the oral motion for a 14-day extension of time to file the answering brief. The answering brief due date was changed to July 21,

2010, and the optional reply brief is due within 14 days after service of this answering brief.

V.

STATEMENT OF THE FACTS[3]

Plaintiffs Wayne Washington, Marla James, James Armantrout, and Charles Daniel DeJong reside in Orange County, California and are citizens of the United States. (Complaint, SER Tab "A," ¶ 3.) They do not allege or claim to be residents of the City of Lake Forest.

Each plaintiff is alleged to be a "qualified person with a disability" under the ADA. (*Id.*, ¶ 4.) Plaintiffs depend on marijuana "to assist with their being able to participate in major life activities and receive services or participate in programs provided by public entities such as: use of public transportation, public roadways, libraries, parks and other public services." (*Id.*, ¶ 9.)

[3] Appellants filed their Complaint and Notice of Application and *Ex Parte* Application by Plaintiffs For a Temporary Restraining Order and Order to Show Cause re: Preliminary Injunction on April 2, 2010 and April 6, 2010, respectively. Since then, the parties have stipulated to a stay of the District Court proceedings, which the District Court has ordered, pending the outcome of this appeal. For this reason and because the appeal focuses on a legal issue, the facts are derived from the Complaint. A copy of Plaintiffs' Complaint is included at tab "A" of Lake Forest's Supplemental Excerpts of Record ("SER") filed concurrently herewith. By reciting Appellants' allegations, Appellee Lake Forest does not concede that the allegations are accurate, complete, or undisputed.

Each plaintiff alleges he or she "obtained a prescription from a medical doctor licensed in California to use and is using medical marijuana to assist with their medical conditions." (*Id.*, ¶ 5.) There was no evidence, however, that any plaintiff had a prescription.

Each plaintiff is a member of a marijuana dispensary in Orange County, which they claim is his or her only way to obtain the substance. (*Id.*, ¶¶ 6, 8.) Plaintiffs are "unable to cultivate, grow, harvest or prepare medical marijuana on their own." (*Id.*, ¶ 7.)

Plaintiffs allege that due to their "unique dependence" on the availability of dispensaries where they are able to obtain marijuana, if Defendants City of Costa Mesa or City of Lake Forest close marijuana distribution facilities, each plaintiff will be denied the receipt of marijuana. (*Id.*, ¶ 10.) "By denying existence of, closing or otherwise inhibiting the access to dispensaries in the cities where the plaintiffs . . . obtain medical marijuana, the defendants . . . are discriminating against the disabled plaintiffs, thereby denying the plaintiffs access to public services. Should such discrimination be allowed to exist, the plaintiffs will suffer irreparable harm." (*Id.*, ¶ 11.)[4]

Plaintiffs explain the applicable law as follows: "The people of the State of California and the California legislature have enacted laws (Proposition 215;

[4] Plaintiffs state they "will be filing for class status of similarly affected qualified persons with a disability that reside in California. . . ." (*Id.*, ¶ 12.)

California Senate Bill 420) providing for the medical use of marijuana (Proposition 215) and means for patients suffering from serious illnesses and disabilities to access medical marijuana (SB 420). Under these laws, related sections of the California codes and California Court decisions, California authorized the establishment of medical marijuana dispensaries. These provisions, commonly referred to as the Medical Marijuana Program Act SB 420 ("MMPA"), contain strict controls balancing the importance of making the marijuana based medicine available to patients against improper use of marijuana." (*Id*., ¶ 15.)

Each city is incorporated under the laws of the state of California. Title II of the ADA applies to states and cities. "Under Title II, states and cities['] laws, ordinances, policies, practices and procedures must not intentionally or on a disparate impact basis discriminate against the disabled individual's meaningful access to public services." (*Id*., ¶ 20.)

The City of Costa Mesa's city codes define and provide for medical marijuana dispensaries. The city code also includes and incorporates a "zoning matrix" in Section 13.30. Medical marijuana dispensaries are completely prohibited in the zoning matrix in Costa Mesa. (*Id.*, ¶ 16.) Further, "[o]n or around March 5, 2010, and as recently as March 31, 2010, the City of Costa Mesa issued 48-hour Cease and Desist Orders to medical marijuana dispensaries" in the City. (*Id.*, ¶ 18.)

"The City of Lake Forest has filed suit to enjoin the operation of collectives organized under the MMPA, conducted police raids and has publically [sic] stated thru its attorneys that there will be no marijuana collectives in the City of Lake Forest." (*Id*., ¶ 19.)

The Doe Defendants are conducting themselves "similarly to the . . . City of Costa Mesa and City of Lake Forest in regard to denying Plaintiffs and those similarly 'qualified persons with a disability' their rights under the ADA when a county or municipality takes action to deny them access to a medical marijuana collective." (*Id*., ¶ 23.) Defendants' actions are alleged to have damaged and to continue to damage the Plaintiffs. (*Id*., ¶ 24.)

VI.
SUMMARY OF ARGUMENT

Lake Forest's land use regulations, which do not permit marijuana distribution facilities, are valid under state law. The ADA does not protect the "illegal use of drugs." The District Court properly interpreted the ADA's limited exception to that rule, 42 U.S.C. § 12210(d)(1), correctly in requiring that the first exception for drug use under the supervision of a licensed health care professional be read in conjunction with the second exception for "other uses authorized by the Controlled Substances Act." Appellants' grammatical convolutions serve merely to obfuscate the District Court's logical analysis of the applicable provision of the

ADA. In addition, a panel of this Court has already determined that the ADA does not require reasonable accommodation of medical marijuana use.

A local District of Columbia ("D.C.") law de-criminalizing medical marijuana under District of Columbia law has no application here because it is not a federal law, and Plaintiffs have no Equal Protection right to the application of local D.C. law in California.

Finally, the injunction Plaintiffs seek against Lake Forest, to block pending litigation in California State Court, is barred under the Anti-Injunction Act. For this reason too, the Court should affirm the District Court's decision not to issue the requested preliminary injunction.

VII.
ARGUMENT

A. LAKE FOREST PROPERLY PROHIBITS MARIJUANA DISTRIBUTION FACILITIES UNDER ITS POLICE POWERS

1. Zoning Restrictions Apply to Marijuana Dispensaries

Comprehensive zoning regulations lie within the police power of local governments. (See *Village of Euclid v. Ambler Realty Company*, 272 U.S. 365, 388, 47 S. Ct. 114, 71 L. Ed. 303 (1926).) A city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict

with general laws. (Cal. Const. art. XI, §7.) A land use regulation lies within the police power if it is reasonably related to the public welfare. (See *Associated Home Builders, Inc. v. City of Livermore*, 18 Cal.3d 582, 600-01 (1976).)

In the particular case of medical marijuana dispensaries, California state law does not restrict cities' power to enact land use or zoning laws affecting these businesses, nor limits cities' abilities to enforce existing local laws against them. (*City of Claremont v. Kruse*, 177 Cal.App.4th 1153 (2009) ("*Kruse*"); *City of Corona v. Naulls*, 166 Cal.App.4th 418 (2008) ("*Naulls*").) Moreover, California's courts have narrowly construed the Compassionate Use Act and Medical Marijuana Program. In *People v. Mentch*, 45 Cal.4th 274, 286, fn.7 (2008), the California Supreme Court said the Compassionate Use Act "is a narrow measure with narrow ends." In 2005, the Court of Appeal noted in *People v. Urziceanu*, 132 Cal.App.4th 747 (2005), that "the Compassionate Use Act created a limited defense to crimes, not a constitutional right to obtain marijuana." The criminal defenses in the Act are "limited to the narrow circumstances approved by the voters" and the Act "does not allow the importation or cultivation of marijuana by large commercial enterprises." (*Id*., at p. 774.) Given the Act's limited reach, the court in *Urcizeanu* noted that "courts have consistently resisted attempts by advocates of medical marijuana to broaden the scope" of its specific, enumerated exemptions. (*Id*., at p. 773.)

Within this framework, Lake Forest has properly exercised its authority to prohibit marijuana dispensaries in the City and has sought injunctive relief in the state courts to enforce that prohibition. (Complaint, SER Tab "A," ¶ 19.) As such, the question in this case is whether federal law requires an exception to that general prohibition on marijuana dispensaries, notwithstanding the fact that marijuana is also illegal under federal law.

2. Marijuana Use Remains Illegal Under Federal Law Despite California's Compassionate Use Act And Medical Marijuana Program

While California provides a limited defense to criminal prosecution for medical marijuana use, Federal law continues to criminalize *any* use of marijuana. Federal law on the possession and distribution of marijuana is found in the Controlled Substances Act ("CSA"). (21 U.S.C. §801 *et seq.*) The Controlled Substances Act classifies marijuana as a "Schedule I"[5] controlled substance and prohibits its use for any purpose. (21 U.S.C. § 812(b)(1) [marijuana has "no currently accepted medical use in treatment in the United States."].) Thus, notwithstanding California's medical marijuana laws, anyone using marijuana is in violation of the federal laws and may be prosecuted. (*United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001) [no medical marijuana

[5] There are five categories or "schedules" in the Controlled Substances Act. (21 U.S.C. § 812.)

exception to federal prohibitions in Controlled Substances Act].) "The mere fact that marijuana – like virtually every other controlled substance regulated by the CSA – is used for medicinal purposes cannot possibly serve to distinguish it from the core activities regulated by the CSA." (*Gonzales v. Raich*, 545 U.S. 1, 28, 125 S.Ct. 2195 (2005).)

In *Gonzales v. Raich*, the United States Supreme Court held that any person using marijuana for medical purposes under California law can be criminally prosecuted under federal law. (*Id.*, 545 U.S. at p. 32.) The Supreme Court did not strike down California's medical marijuana statutes; however, the Court made clear that "[t]he Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail," and no person is immune from federal prosecution under state medical marijuana law. (*Id*., 545 U.S. at p. 29.) Subsequent federal cases have followed *Raich* and reaffirm federal law supremacy over California's medical marijuana laws. (*United States v. $186,416.00*, 590 F.3d 942, 949 (9th Cir. 2010) ["no exception for medical marijuana distribution under the federal Controlled Substances Act"]; *Raich v. Gonzales*, 500 F.3d 850, 866 (9th Cir. 2007) [no fundamental right to use medical marijuana].)

Like the United States Supreme Court, the California Supreme Court has recognized that federal law makes marijuana use illegal despite California's

medical marijuana law. In the employment context, for example, the State Supreme Court ruled in *Ross v. Raging Wire Telecommunications, Inc.*, 42 Cal.4th 920 (2008), that employers do not have a duty under the Fair Employment and Housing Act ("FEHA") to accommodate an employee's use of marijuana under the Compassionate Use Act and the MMP. (*Id.*)

Stated simply, marijuana use remains illegal under federal law regardless of California's medical marijuana laws.

B. THE ADA DOES NOT PROVIDE PLAINTIFFS AN EXCEPTION FROM THE LAKE FOREST RESTRICTION ON MARIJUANA DISPENSARIES

Plaintiffs' claim to an exception from Lake Forest's restriction on marijuana dispensaries under the ADA fails. As the District Court properly found, their "illegal use of drugs" disqualifies them under the statute as "individuals with a disability" and the exemptions from that disqualification do not apply to marijuana use. Moreover, this Court has already determined that the ADA does not require reasonable accommodation of medical marijuana use. Finally, the local District of Columbia law allowing use of medical marijuana in the District does not legalize marijuana dispensaries in Lake Forest, California.

1. The Trial Court Interpreted the Relevant Statutes Correctly

Appellants brought their action under Title II of the ADA, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefit of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." (42 U.S.C. § 12132.) The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." (42 U.S.C. § 12131(2).) The term "public entity" includes local governments, such as the cities here. (42 U.S.C. § 12131(1)(A).)

Under Title II of the ADA [42 U.S.C. §§ 12131-12134], a claim of disability discrimination requires four elements: "(1) the plaintiff is an individual with a disability; (2) the plaintiff is otherwise qualified to participate in or receive the benefit of some public entity's services, programs, or activities; (3) the plaintiff was either excluded from participation in or denied the benefits of the public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (4) such exclusion, denial of benefits, or discrimination was

by reason of the plaintiff's disability." (*Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002) (citing *Weinreich v. L.A. County Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997).) "Disability" under the ADA means one of three things: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment . . . ." (42 U.S.C. § 12102(1).)

The District Court's denial of Appellants' request for a preliminary injunction began and ended with the first element: whether Appellants were or are "individuals with a disability." The ADA expressly *excludes* one "who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use." (42 U.S.C. § 12210(a).) The Act then defines "illegal use of drugs" as "the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. [§] 812). Such term does not include the use of a drug taken under supervision by a licensed health care professional, *or other uses authorized by the Controlled Substances Act or other provisions of Federal law*." (42 U.S.C. § 12210(d)(1) (italics added).) Congress imported the CSA into the ADA through the very definition of a "drug," meaning "a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C. § 812]." (42 U.S.C. § 12210(d)(2).) As the District Court has acknowledged, by its terms, Title II requires that for this exception to apply, "the

use of the drug taken under the supervision of a licensed health care professional [must] be *consistent* with the [CSA]." (*Barber v. Gonzales*, 2005 U.S. Dist. LEXIS 37411 (E.D. Wash. 2005), pp. 3-4 (italics added).)

As noted, marijuana is a "Schedule I" controlled substance under the CSA – the most restricted: it has a high potential for abuse, possesses no currently accepted medical use in treatment in the United States, and accepted safety for use of the drug under medical supervision is lacking. (21 U.S.C. § 812(b)(1)(A)-(C).) As a Schedule I substance, marijuana cannot even be dispensed by prescription. (21 U.S.C. § 829 (listing only substances on schedules II through V).)

The only authorized use of marijuana under the CSA is under a strictly regulated research program. (21 U.S.C. § 823(f).) "Schedule I drugs may be obtained and used lawfully only by doctors who submit a detailed research protocol for approval by the Food and Drug Administration and who agree to abide by strict recordkeeping and storage rules." (*County of Santa Cruz v. Ashcroft*, 279 F.Supp.2d 1192, 1197 (N.D. Cal. 2003) (quoting *Alliance for Cannabis Therapeutics v. Drug Enforcement Admin*., 15 F.3d 1131, 1133 (D.C. Cir. 1994).) As the Supreme Court observed, "the Controlled Substances Act . . . reflects a determination that marijuana has no medical benefits worthy of an exception (outside the confines of a Government-approved research project)." (*United States*

v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 491, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001).)

The question before the District Court thus was not whether either Costa Mesa's or Lake Forest's actions constitute "a policy, practice or procedure which discriminates against [them]" but whether, as admitted users of illegal drugs, Appellants are nevertheless entitled to the protections of the ADA in the first instance. The Court agreed with Appellees. (*James v. City of Costa Mesa*, 2010 U.S. Dist. LEXIS 53009 (C.D. Cal. 2010), p. 8.) Noting that, as a Schedule I controlled substance, marijuana "currently has no medical purpose" and could not be prescribed, the court found that Appellants could only succeed if "the ADA . . . authorize[s], *independent* of the Controlled Substances Act, [Appellants'] use of marijuana under a doctor's supervision. But the ADA gives no such authorization." (*Id*., p. 9 (italics added).)

The Court turned to an analysis of Section 12210(d), which defines "illegal use of drugs" as:

> The use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

The Court then explained that the first clause in the second sentence ("Such term does not include the use of a drug taken under supervision by a licensed health care

professional") had to be read in context with the clause that followed, that is, "or other uses authorized by the Controlled Substances Act." (*Id.*, at p. 10.) That second clause, the court explained "shows that the preceding clause also requires authorization from the Controlled Substances Act, which, as established above, exists for some drugs, but not marijuana." (*Ibid*.)

The court rejected Appellants' argument, based on the sentence's structure, that "use of the conjunctive 'or' combined with the comma after 'professional' means that both are independent clauses, and satisfaction of either clause should trigger the exception to illegal drug use." (*Ibid*.) Appellants' construction failed to account for the word "other," the court found. Without the word, the second sentence contained two independent clauses. "But as written, the word 'other' depends on the first clause, and encompasses all of the 'other' authorized uses in the Controlled Substances Act besides a prescription by a doctor." (*Id*., p. 11.) The court stated the clauses had to be taken together. (*Ibid*.) Citing another district court decision, *Barber v. Gonzales*, *supra*, 2005 U.S. Dist. LEXIS 37411, at p. 4, the court concluded that "the exception applies only to authorized uses under the Controlled Substance Act or other Federal laws." (*Ibid*.)

2. Appellants' Convoluted Grammatical Argument Unnecessarily and Erroneously Strains the District Court's Logical and Correct Interpretation of the Statute

Faced with the only interpretation of Section 12210(d)(1) that makes sense, Appellants engage in a complicated reconstruction of the two sentences.

a. The First Sentence of Section 12210(d)(1)

Under the heading "'illegal use of drugs' defined," Subsection 12210(d) defines two terms: "illegal use of drugs" and "drugs." Subsection (d)(1) refers directly – and only – to the Controlled Substances Act: "The term 'illegal use of drugs' means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 801 *et seq.*)." There is no ambiguity here about which law or which actions comprise the illegal use of drugs for purposes of the ADA. Congress made the CSA the reference point for this issue under the ADA. Lest there be any doubt, subsection (d)(2) defines "drug" as "a controlled substance, *as defined in schedules I through V of section 202 of the Controlled Substances Act* [21 U.S.C. § 812]." (§ 12210(d)(2) (italics added).)

b. The Second Sentence of Section 12210(d)(1)

The second sentence provides: "Such term ['illegal use of drugs'] does not include the use of a drug taken under supervision by a licensed health care

professional, or other uses authorized by the Controlled Substances act or other provisions of Federal law." As both subsection (d)(2) and the first sentence of subsection (d)(1) each refer to the CSA, this statutory scheme is the ADA's reference point for the exceptions listed in the second sentence of subsection (d)(1).

The District Court here found that the first clause ["use of a drug taken under supervision by a licensed health care professional"] had to be read with the second clause ["or other uses authorized by the Controlled Substances Act"] to include in the ADA exception "all the *authorized* uses under the Controlled Substances Act[.]" (*James v. City of Costa Mesa*, 2010 U.S. Dist. LEXIS 53009 (C.D. Cal. 2010), p. 11 (italics added).) In fact, when the two clauses are read together, it is clear that Congress enacted exceptions from ADA's "illegal use of drugs" definition to comport with the CSA.

Appellants contend, however, that the exception in the second sentence applies to any "use of a drug taken under supervision by a licensed health care professional," regardless of the legal authority under which the otherwise illegal drug use occurs (for example, under California law). Appellants' interpretation would permit an otherwise illegal drug user with a "recommendation" to come within the ADA's statutory exception for "illegal use of drugs." Interpreting the clause this way, though, requires the reader to completely ignore the sentence that

precedes it. That sentence, as noted, refers to the CSA. Exceptions listed immediately thereafter would naturally be exceptions *to the CSA*.

The second sentence lists three exceptions, all in reference to the CSA, even where this is not stated. The first exception is the use of a drug taken under supervision by a licensed health care professional. The health care professional's supervision is necessarily within the confines of the CSA because the exception is *to* the CSA. The second exception removes any doubt about the first exception by stating that "illegal use of drugs" does not include *other authorized* uses under the CSA. The third exception implicitly acknowledges the CSA by excepting other uses authorized by "other provisions of Federal law." The key word is "authorized," whether by the CSA or other Federal statutes.

Appellants do not contend that their use of marijuana is consistent with the CSA, notably with respect to any of the listed exceptions. Rather, they contend that it is sufficient that they take the drug "under supervision by a licensed health care professional," that is, anyone "recommending" they use marijuana. Nowhere do they argue that the type of supervision they purportedly receive complies with the CSA. Instead, they engage in a lengthy grammatical exegesis intended to show that the author's comma placement and use of the word "or" establishes that the exception for "other uses authorized by the Controlled Substances Act" stands alone and in no way refers to the exception immediately preceding it ("use of a

drug taken under supervision by a licensed health care professional"). (AOB, pp. 24-25.)

Moreover, the District Court's interpretation of section 12210(d)(1) is at least equally plausible and far more straightforward. The Court relied on the fact that the word "other" in the second exception made the clause dependent in reference to the first exception. Appellants argue that both clauses are independent. The District Court's point was that the second clause referred back to the first exception. The first exception spells out a specific example, then when read with the second exception clarifies that both exceptions are only for authorized uses of drugs *under the CSA*.

Without repeating Appellants' 20-plus page argument, Lake Forest submits that Appellants' argument requires considerably more grammatical contortions than does the District Court's. At its essence, Appellants contend, as they did below, that the placement of a comma between the first and second exceptions means each exception must be read separately, without reference to each other. As shown above, it only makes sense to read the exceptions in reference to the Controlled Substances Act. Had Congress intended to provide a statutory right use to a drug that it has determined to have "no acceptable medical uses" (*Raich*, *supra*, 545 U.S. at 27), one would expect it would have done so more expressly and avoid the need for the grammatical contortions Appellants must go through to

get to their desired outcome. The District Court's interpretation should be accepted and affirmed.

3. Appellants' Contention That Congress Included All of the 12210(d) Exceptions to Protect the Disabled Lacks Support in the Legislative History They Cite

Appellants assert that the original Senate Bill did not contain an "illegal use of drugs" prohibition, which was added later. Without citation to authority, Appellants speculate that "the ADA's '*illegal use of drugs*' prohibition was not meant for [them]. The ADA was written to *include* these appellants rather than to exclude them." (AOB, p. 29.) Appellants' suggestion that there are "good" illegal drug users, such as themselves, and "bad" illegal drug users, such as "drug abusers and street drug users" (*Id.*) is unique, but distinguishing between the two categories is not as simple as merely determining who happens to hold a "recommendation." The District Court properly discerned the only logical reason Congress included the word "other" in the second exception – to connect it to the first exception. Appellants' argument to the contrary should be rejected.

4. The ADA Does Not Require a Reasonable Accommodation for Marijuana Use

The District Court's determination is also consistent with this Court's disposition in *Assenberg v. Anacortes Housing Auth.*, 268 Fed. Appx. 643 (9th Cir.

2008). There, the Court stated "The Fair Housing Act, Americans with Disabilities Act, and Rehabilitation Act all expressly exclude illegal drug use, and AHA did not have a duty to reasonably accommodate Assenberg's medical marijuana use." Although this is an unpublished memorandum disposition, it may be cited pursuant to Fed. R. App. P. 32.1 and Ninth Cir. R. 36-3.[6] While it is not precedent, and therefore not binding on this Court as law of the Circuit, Lake Forest submits that the panel's prior consideration and determination of this issue is highly persuasive and should be adopted by the Court in this case.

5. Washington D.C.'s Initiative 59 is a Local Ordinance, not a Federal Law, and Has No Effect on California Law or the Issues in This Case

Finally, Appellants contend that the District of Columbia's local ordinance de-criminalizing medical marijuana *in the District* entitles them to an exception from the Lake Forest restrictions against marijuana distribution facilities in Lake Forest. They appear to make two arguments on this front: first, that the D.C. law is a "provision of federal law" that entitles them to an exception under the ADA (AOB, p. 47)[7], and second, that equal protection requires the application of the

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[6] A copy of the opinion is appended hereto as Appendix "A" for the Court's convenience and pursuant to Fed. R. App. P. 32.1(b).

[7] Their heading contends that the "District Court erred when it determined that equal protection does *not* provide Appellants an 'other provision of federal law' for purposes of the ADA's 122210(d)(1) 'illegal use of drugs' exception." (AOB, p.

D.C. law in California, and indeed, nationwide. (*Id.*, at pp. 47-48.) Neither argument has merit.

a. District of Columbia Initiative 59 is Not a Federal Law

Appellants begin with the proposition that the District of Columbia "is a special *federal* district unlike the several states and is controlled by the Federal government." (AOB, p. 33). Congress responded to calls for local self-government by enacting the District of Columbia Self-Government and Governmental Reorganization Act of 1973, Pub. L. 993-198 (codified as amended at D.C. Code § 1-201.01 et seq. ("the Home Rule Act"). Congress thus authorized D.C. residents to elect a mayor and City Council. The Home Rule Act delegated to the D.C. Council "legislative power" over "all rightful subjects of legislation." (D.C. Code § 1-203.02.) But as to these subjects, "D.C. Council enactments become law only if Congress declines to pass a joint resolution of disapproval within thirty days (or sixty days in the case of criminal laws)." (*Marijuana Policy Project v. D.C. Bd. Of Elections and Ethics*, 304 F.3d 82 (D.C. Cir. 2002) [citing D.C. Code § 1-206.02(c)(1)-(c)(2)].) As the D.C. Circuit further explained,

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33.) Nowhere in the District Court's Order of April 30, 2010 does the Court address, let alone rule on, Appellants' equal protection argument. Lake Forest respectfully submits that, if this Court were to reverse the District Court's Order and remand the case to the District Court, it would be a more effective use of judicial resources to allow the District Court to make the initial determination on the matter.

"Congress expressly reserves the right to enact legislation concerning the District on any subject and to repeal D.C. Council enactments at any time. (D.C. Code Ann. § 1-206.01.) Finally, the Act prohibits District officers and employees from expending any funds unless authorized to do so by Congress. (D.C. Code Ann. § 1-204.46.)" (*Id.* at p. 83.)

Appellants argue that Initiative 59 in Washington, D.C. serves as an "other provision of federal law" sufficient to trigger the exception under section 12210(d)(1) of the ADA. Briefly, Initiative 59, like California's Compassionate Use Act, provided for the local decriminalized use of medical marijuana *in the District*. Careful review of that initiative reveals that it is a *local ordinance.* It begins "[t]his initiative changes *the laws of the District of Columbia* to:" use marijuana for medical purposes under certain circumstances. (*See* D.C. Act 13-138 [emphasis added].)[8] Section 3 of the initiative provides that "[m]edical patients who use, and their primary caregivers who obtain for such patients, marijuana for medical purposes upon the recommendation of a licensed physician do not violate *the District of Columbia Uniform Controlled Substances Act of*

[8] A complete copy of Initiative 59 (D.C. Act 13-138), obtained from the official District of Columbia website <http://www.dccouncil.washington.dc.us/images/00001/20100329111423.pdf> is appended hereto as Appendix "B." The language Appellants quote in their Brief and the Appendix thereto from this enactment differs from that contained in the only version of that law which counsel for Lake Forest was able to locate on the official District of Columbia website. For purposes of completeness and context, Lake Forest is including the entire enactment in the Appendix hereto.

1981, . . . (D.C. Law 4-29; D.C. Code § 33-501 *et seq.*) ('Controlled Substances Act')." (Emphasis added).[9] Section 6 of the D.C. Initiative provides that "[a]ny *District law* prohibiting the possession of marijuana or cultivation of marijuana shall not apply to a medical patient . . . ." (Emphasis added). Finally, Section 8 of the D.C. Initiative states that "*[r]esidents of the District of Columbia* may organize and operate not-for profit corporations for the purpose of cultivating, purchasing and distributing marijuana exclusively for medical use . . . ." (Emphasis added).

As Appellants explain, after Congress blocked implementation of the Initiative over a period of ten years, it allowed the D.C. Initiative to become effective via the 2010 Omnibus Appropriations Act. Without any authority for the proposition, Appellants posit that by allowing the D.C. Initiative to become effective, that local ordinance somehow became a *federal* law such that the exception within Section 12210(d)(1) of the ADA providing that drug use is not illegal if "authorized by . . . other provisions of federal law." (AOB, p. 40.) Indeed, Appellants argue for a broader effect: "Congress has taken action that should apply not only in the federal District but in all states that have already or in the future provide for the use of medical marijuana." (*Ibid.*)

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[9] Thus, "Controlled Substances Act" as used in the D.C. Initiative refers to the local *District of Columbia* Controlled Substances Act, not the *Federal* Controlled Substances Act, 21 U.S.C. §§ 801, *et seq.*

The mere fact that the District of Columbia is a federal territory, however, does not mean that D.C. laws are "federal" laws. "Unlike most congressional enactments, the [D.C.] Code is a comprehensive set of laws equivalent to those enacted by state and local governments having plenary power to legislate for the general welfare of their citizens." (*Key v. Doyle*, 434 U.S. 59, 68, n. 13, 98 S. Ct. 280, 54 L. Ed. 2d 238 (1977).) As noted above, the D.C. Initiative makes clear on its face that it is a *local* ordinance. Appellants even admit that "Congress' actions in allowing for medical marijuana are *District of Columbia specific*." (AOB, p.52 [emphasis added].)

Appellants point to no change in *federal* law on the topic of marijuana. The federal Controlled Substances Act has not been repealed or amended. Appellants offer nothing to support their implied proposition that a local D.C. ordinance has nationwide effect as federal law. Just as a D.C. City Council determination to change local speed limits would not affect a change of traffic laws anywhere else in the nation, a D.C. determination to provide an exception from its local marijuana law to permit medical marijuana use does not create an exception in other cities' or states' laws prohibiting marijuana dispensaries.[10] District of Columbia Initiative 59 is not a federal law, and has no application in Lake Forest.[11]

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[10] Moreover, if the D.C. Initiative was an "other federal law" for purposes of Section 12210 of the ADA, then it would apply nationwide, not just, as Appellants assert, in states that have decriminalized marijuana used for medical purposes.

b. Equal Protection Does not Require Application of Local District of Columbia Laws Nationwide

Appellants also argue that principles of equal protection require that California residents receive the benefit of local District of Columbia law. (AOB, pp. 44-45. They contend that equal protection guarantees "that Congress' decisions apply not only in Washington, D.C. but also in California." (AOB, p. 44.) This argument is largely a variation on their principal contention that Congress' inaction with respect to Initiative 59 is the functional equivalent of a federal law. As shown above, Appellants fail to establish that proposition. Once one recognizes that the D.C. Initiative is a local, not federal, law, Appellants are left only with the argument that the residents of one jurisdiction (here, California) have an equal-protection right to the benefits of a law of another jurisdiction (here, D.C.).

Because the ADA obviously applies in every state, if Appellants are correct that marijuana used for medical purposes is not "illegal use of drugs" under the ADA because the D.C. Initiative is an "other federal law" which permits marijuana use, then *all* states would have to allow the medical use of marijuana under the ADA. Had Congress intended to pass a nationwide mandate that all states must permit the use of marijuana for medical purposes, it would not have done so by *omitting* to block a local District of Columbia ordinance.

[11] Appellants' argument at pages 43-44 of their Opening Brief regarding Executive Branch actions in regard to medical marijuana is irrelevant. As Appellants themselves acknowledge, only Congress has constitutional authority to make and pass federal law. (AOB, p. 43.) An Executive determination to focus enforcement efforts on priorities other than prosecution of marijuana offenses is not by any means a "federal law" legalizing the use of marijuana.

Appellants offer no authority to support any such proposition. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954), applied the holding in *Brown v. Board of Education* to students in the D.C. school system. Thus, all students within the D.C. school system were entitled to equal treatment. The students there were not claiming an equal protection right to the benefits of the laws of another jurisdiction. Similarly, *Associated Gen'l Contractors v. Jacksonville*, 508 U.S. 656 (1993), involved a claim by one group of contractors doing business in Jacksonville that the City's minority business enterprise ordinance discriminated against them in favor of another class of contractors doing business in Jacksonville. The plaintiffs there did not seek, and the Court did not hold, that those plaintiffs were entitled to the benefit of the laws of any other jurisdiction.

The District of Columbia medical marijuana initiative is a local ordinance that has no application in this case. It is not a "federal law" such that it provides an exception to the prohibition on applying the ADA to protect illegal drug use, and Appellants have no equal-protection right to application of D.C. law in California. The District of Columbia has its medical marijuana law, and California has its own law. California's law provides that Lake Forest may prohibit marijuana dispensaries within its jurisdiction. There is no federal law that requires California to permit greater access to marijuana than it already does. The District Court properly denied appellants' request for a preliminary injunction to bar Lake Forest

from enforcing its valid limitations on marijuana dispensaries within the city under California law.

C. APPELLANTS' REQUEST TO ENJOIN LAKE FOREST'S PENDING STATE-COURT ENFORCEMENT ACTIONS AGAINST UNLAWFUL MARIJUANA DISPENSARIES WAS ALSO PROPERLY DENIED BECAUSE SUCH AN INJUNCTION IS NOT AVAILABLE UNDER THE ANTI-INJUNCTION ACT

Finally, although the District Court did not need to reach this argument in denying Appellants' Motion for Preliminary Injunction, the Motion also could not have been granted because doing so would violate the Anti-Injunction Act. Appellants asked that "the [District] Court order the City of Lake Forest to stop any and all zoning, nuisance, or other civil action(s) it has pending against medical marijuana collectives." (Mem. P. & A. in Support of Ex Parte Application for Temporary Restraining Order, SER Tab "B," at p. 25:12-15.) This relates to Lake Forest's pending action in State Court, *City of Lake Forest v. Mark Moen, et al.*, Orange County Superior Court Case No. 30-2009 00298887. (*Id.*, pp. 4:22-5:3.)

The Anti-Injunction Act provides "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. That Act prohibits the Court from enjoining a pending State Court case, even where it is alleged that the

State Court action violates the ADA. (See *Safe Haven Sober Houses, LLC v. City of Boston*, 517 F.Supp.2d 557, 568 (D. Mass. 2007). For this reason too, Appellants failed to show a likelihood of success on the merits of their claim for injunctive relief to stop Lake Forest's pending State Court case against the dispensaries. Accordingly, the District Court's denial of the preliminary injunction should be affirmed.

VIII.
CONCLUSION

For the reasons set forth above, the City of Lake Forest respectfully submits that the District Court's Order denying Appellants a preliminary injunction should be affirmed.

Dated: July 21, 2010

Respectfully submitted,

Best Best & Krieger LLP

By: **/s/ Daniel S. Roberts**
Jeffrey v. Dunn
Daniel S. Roberts
Lee Ann Meyer
Attorneys for Defendant-Appellee
CITY OF LAKE FOREST

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6755 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type and style requirements of Fed. R. App. P. 32 (a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point font.

Dated: July 21, 2010

/s/ Daniel S. Roberts
Daniel S. Roberts

STATEMENT OF RELATED CASES

No other cases are deemed related to this case pursuant to Ninth Circuit Rule 28-2.6.

Dated: July 21, 2010 **/s/Daniel S. Roberts**
Daniel S. Roberts

APPENDIX

Tab	Description
A	*Assenberg v. Anacortes Housing Auth.*, 268 Fed. Appx. 643 (9th Cir. 2008).
B.	D.C. Act 13-138 [Initiative Measure 59]
C.	28 U.S.C. § 2283

*268 Fed. Appx. 643, *; 2008 U.S. App. LEXIS 5434, ***

MICHAEL ADAM ASSENBERG; CARLA KEARNEY, Plaintiffs - Appellants, v. ANACORTES HOUSING AUTHORITY, Defendant - Appellee.

No. 06-35545

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

268 Fed. Appx. 643; 2008 U.S. App. LEXIS 5434

January 10, 2008 ** , Submitted, Seattle, Washington

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).
March 5, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by Assenberg v. Anacortes Hous. Auth., 129 S. Ct. 104, 172 L. Ed. 2d 84, 2008 U.S. LEXIS 7372 (U.S., 2008)

PRIOR HISTORY: [1]**
Appeal from the United States District Court for the Western District of Washington. D.C. No. CV-05-01836-RSL. Robert S. Lasnik, District Judge, Presiding.
Assenberg v. Anacortes Hous. Auth., 2006 U.S. Dist. LEXIS 34002 (W.D. Wash., May 25, 2006)

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs challenged a judgment from the United States District Court for the Western District of Washington, which granted summary judgment in favor of defendant housing authority in plaintiff's action that asserted claims under the Fair Housing Act (FHA), the Americans with Disabilities Act (ADA), the Rehabilitation Act, and state law.

OVERVIEW: The housing authority terminated plaintiffs' lease based on the illegal drug use of one plaintiff. Plaintiffs attempted to raise a medical necessity defense. On appeal, the court held that the FHA, the ADA, and the Rehabilitation Act expressly excluded illegal drug use under 42 U.S.C.S. §§ 3602(h), 12210(a) and 29 U.S.C.S. § 705(20)(C)(i). The housing authority did not have a duty to reasonably accommodate the one plaintiff's medical marijuana use. The housing authority did not violate the Department of Housing and Urban Development's (HUD) policy by automatically terminating plaintiffs' lease based on the one plaintiff's drug use without considering factors that HUD listed in its September 24, 1999 memo. The district court properly dismissed plaintiffs' state law claims because Wash. Rev. Code § 49.60.222(2)(b) required only "reasonable accommodation" and requiring public housing authorities to violate federal law would not be reasonable.

OUTCOME: The court affirmed the judgment of the district court.

CORE TERMS: drug use, housing authorities, reasonable accommodation, marijuana, Housing, terminating, lease

LEXISNEXIS(R) HEADNOTES

Civil Rights Law > Protection of Disabled Persons > Americans With Disabilities Act > Accommodation
Civil Rights Law > Protection of Disabled Persons > Americans With Disabilities Act > Scope
Civil Rights Law > Protection of Disabled Persons > Rehabilitation Act > Accommodation
Civil Rights Law > Protection of Disabled Persons > Rehabilitation Act > Scope
Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

HN1 The Fair Housing Act, Americans with Disabilities Act, and Rehabilitation Act all expressly exclude illegal drug use, and a housing authority does not have a duty to reasonably accommodate a plaintiff's medical marijuana use. 42 U.S.C.S. §§ 3602(h), 12210(a); 29 U.S.C.S. § 705(20)(C)(i).

Public Health & Welfare Law > Housing & Public Buildings > General Overview
Real Property Law > Financing > Federal Programs > U.S. Department of Housing & Urban Development Programs

HN2 The Department of Housing and Urban Development does not mandate that public housing authorities consider the factors elucidated in its September 24, 1999 memo prior to terminating a lease based on illegal drug use.

Civil Rights Law > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Act
Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

HN3 Washington law requires only "reasonable" accommodation. Wash. Rev. Code § 49.60.222(2)(b). Requiring public housing authorities to violate federal law would not be reasonable.

COUNSEL: For MICHAEL ADAM ASSENBERG, CARLA KEARNEY, Plaintiffs - Appellants: Lonnie G. Davis, Esq., Attorney, DISABILITIES LAW PROJECT, Seattle, WA.

For ANACORTES HOUSING AUTHORITY, Defendant - Appellee: Neil A. Dial, Esq., Attorney, Jeremy Robert Larson, Esq., Attorney, FOSTER PEPPER, PLLC, Seattle, WA.

JUDGES: Before: BEEZER, KLEINFELD, and TALLMAN, Circuit Judges.

OPINION

[*644] MEMORANDUM *

FOOTNOTES

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Before: BEEZER, KLEINFELD, and TALLMAN, Circuit Judges.

Plaintiffs Michael Assenberg and Carla Kearney appeal the district court's summary judgment in favor of the Defendant Anacortes Housing Authority ("AHA"). We have jurisdiction under 28 U.S.C. § 1291, and we affirm. [1]

FOOTNOTES

1 On January 17, 2007, we denied AHA's motion to reconsider the Appellate Commissioner's December 1, 2006 order to reinstate the appeal.

The district court properly rejected the Plaintiffs' attempt to assert the medical necessity defense. *See Raich v. Gonzales,* 500 F.3d 850, 861 (9th Cir. 2007) **[**2]** (stating that the defense may be considered only when the medical marijuana user has been charged and faces criminal prosecution). HN1 The Fair Housing Act, Americans with Disabilities Act, and Rehabilitation Act all expressly exclude illegal drug use, and AHA did not have a duty to reasonably accommodate Assenberg's medical marijuana use. *See* 42 U.S.C. §§ 3602(h), 12210(a); 29 U.S.C. § 705(20)(C)(i).

AHA did not violate the Department of Housing and Urban Development's ("HUD") policy by automatically terminating the Plaintiffs' lease based on Assenberg's drug use without considering factors HUD listed in its September 24, 1999 memo. HN2 HUD does not mandate that public housing authorities consider the factors elucidated in its memo prior to terminating a lease based on illegal drug use.

Because the Plaintiffs' eviction is substantiated by Assenberg's illegal drug use, we need not address his claim that his snakes qualify as "service animals" or whether AHA offered a reasonable accommodation.

The district court properly dismissed Assenberg's state law claims. HN3 Washington law requires only "reasonable" accommodation. *See* Wash. Rev. Code § 49.60.222(2)(b). Requiring public housing authorities to **[**3]** violate federal law would not be reasonable.

AFFIRMED.

ENROLLED ORIGINAL

D.C. ACT 13-138

SEPTEMBER 20, 1999

Codification District of Columbia Code 2000 Supp.

INITIATIVE MEASURE

No. 59

SHORT TITLE

"LEGALIZATION OF MARIJUANA FOR MEDICAL TREATMENT INITIATIVE OF 1998"

SUMMARY STATEMENT

This initiative changes the laws of the District of Columbia to:

Permit seriously ill individuals to obtain and use marijuana for medical purposes when recommended by a licensed physician to aid in the treatment of HIV/AIDS, glaucoma, muscle spasm, cancer, or other serious or chronic illnesses for which marijuana has demonstrated utility; protect seriously ill persons, their licensed physicians and caregivers from criminal prosecution or sanction where marijuana is prescribed for medical purposes; legalize -- for medical purposes only -- the possession, use, cultivation, and distribution of marijuana, and maintain the prohibition and criminal sanctions against the use of marijuana for any non-medical purpose.

LEGISLATIVE TEXT

New Subchapter IX, Title 33

BE IT ENACTED BY THE ELECTORS OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Legalization of Marijuana for Medical Treatment Initiative of 1998".

New § 33-591.1

Sec. 2. All seriously ill individuals may obtain and use marijuana for medical purposes when a licensed physician has found the use of marijuana to be medically necessary and has recommended the use of marijuana for the treatment (or to mitigate the side effects of other

treatments such as chemotherapy, including the use of AZT, protease inhibitors, etc., radiotherapy, etc.) or diseases and conditions associated with HIV and AIDS, glaucoma, muscle spasm, cancer and other serious or chronic illnesses for which the recommending physician reasonably believes that marijuana has demonstrated utility.

New § 33-591.2

Sec. 3. Medical patients who use, and their primary caregivers who obtain for such patients, marijuana for medical purposes upon the recommendation of a licensed physician do not violate the District of Columbia Uniform Controlled Substances Act of 1981, effective August 5, 1981 (D.C. Law 4-29; D.C. Code § 33-501 *et seq.*) ("Controlled Substances Act") and may not be subject to criminal prosecution or sanction for use consistent with this act.

New § 33-591.3

Sec. 4. (a) Use of marijuana under the authority of this act shall not be a defense to any crime of violence, the crime of operating a motor vehicle while impaired or intoxicated, or a crime involving danger to another person or to the public, nor shall such use negate the mens rea for any offense.

(b) Whoever distributes marijuana cultivated, distributed or intended to be distributed or used pursuant to this act to any person not entitled to possess or distribute marijuana under this act shall be guilty of a crime and subject to the penalty set forth in section 401(a)(2)(D) of the Controlled Substances Act (D.C. Code § 33-541(a)(2)(D)).

New § 33-591.4

Sec. 5. Notwithstanding any other law, no physician shall be punished, or denied any right, privilege or registration for recommending, while acting in the course of his or her professional practice, the use of marijuana for medical purposes. In any proceeding in which rights or defenses created by this act are asserted, a physician called as a witness shall be permitted to testify before a judge, in camera. Such testimony, when introduced in a public proceeding, if the physician witness so requests, shall have redacted the name of the physician and the court shall maintain the name and identifying characteristics of the physician under seal.

New § 33-591.5

Sec. 6. (a) Any District law prohibiting the possession of marijuana or cultivation of marijuana shall not apply to a medical patient, or to a medical patient's primary caregivers, when a medical patient or primary caregiver possesses or cultivates marijuana for the medical purposes of the patient upon the written or oral recommendation of a licensed physician. The exemption for cultivation shall apply only to marijuana specifically grown to provide a medical supply for a patient, and not to any marijuana grown for any other purpose. In determining a quantity of marijuana that constitutes a medical supply, this act shall be interpreted to assure that any medical patient protected by the act shall have access to a sufficient quantity of marijuana to assure that they can maintain their medical supply without any interruption in their treatment or depletion of their medical supply of marijuana.

(b) The prohibition in the Controlled Substances Act against the manufacture, distribution, cultivation, or possession with intent to manufacture, distribute, or cultivate, or against possession, of marijuana shall not apply to a nonprofit corporation organized pursuant to this act.

New § 33-591.6

Sec. 7. (a) A medical patient may designate or appoint a licensed health care practitioner, parent, sibling, spouse, child or other close relative, domestic partner, case manager/worker, or best friend to serve as a primary caregiver for the purposes of the act.

(b) A designation under this act need not be in writing; however, any written designation or appointment shall be prima facie evidence that a person has been so designated.

(c) A patient may designate not more than 4 persons at any one time to serve as a primary caregiver for the purposes of this act.

(d) For the purposes of this subsection, the term "best friend" means a close friend who is feeding, nursing, bathing, or otherwise caring for the medical patient while the medical patient is in a weakened condition.

New § 33-591.7

Sec. 8. Residents of the District of Columbia may organize and operate not-for-profit corporations for the purpose of cultivating, purchasing, and distributing marijuana exclusively for the medical use of medical patients who are authorized by this act to obtain and use marijuana for medical purposes. Such corporations shall comply with the District's nonprofit corporation laws. Fees and licenses shall be collected by the Department of Consumer and Regulatory Affairs ("DCRA") in the same manner as other not-for-profit corporations operating in the District of Columbia. The Director of DCRA shall issue such corporations exemptions from the sales tax, use tax, income tax and other taxes of the District of Columbia in the same manner as other nonprofit corporations.

New § 33-591.8

Sec. 9. (a) The exemption from prosecution for distribution of marijuana under this act shall not apply to the distribution of marijuana to any person under 18 years of age unless that person is an emancipated minor, or a parent or legal guardian of the minor has signed a written statement that such parent or legal guardian understands:

(1) the medical condition of the minor;

(2) the potential benefits and the potential adverse effects of the use of marijuana generally and in the case of the minor; and

(3) consents to the use of marijuana for the treatment of the minor's medical condition.

(b) Violators of this section shall be subject to the penalties of the Controlled Substances Act.

New § 33-591.9

Sec. 10. (a) The Director of the Department of Public Health shall develop a plan, and submit it, within 90 days of the effective date of this act, to the Council of the District of Columbia to provide for the safe and affordable distribution of marijuana to all patients enrolled in Medicaid or a Ryan White CARE Act funded program who are in medical need, who desire to add marijuana to their health care regimen and whose licensed physician reasonably believes that marijuana would be beneficial to their patient.

(b) Within 30 days of the certification of the passage of this act by the people of the District of Columbia, the Mayor of the District of Columbia shall deliver a copy of this act to the President and the Congress to express the sense of the people of the District of Columbia that the Federal government must develop a system to distribute marijuana to patients who need it for medical purposes.

New § 33-591.10

Sec. 11. If any provision of this measure or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of the measure which can be given effect without the invalid provision or application, and to this end the provisions of this measure are severable.

Sec. 12. This act shall take effect following approval by the Financial Responsibility and Management Assistance Authority as provided in section 203(a) of the District of Columbia Financial Responsibility and Management Assistance Act of 1995, approved April 17, 1995 (109 Stat. 116; D.C. Code § 47-392.3(a)), a 30-day period of Congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Code § 1-233(c)(1)), and publication in the District of Columbia Register.

28 USCS § 2283

Retrieve Legislative Impact® **($)**

*** CURRENT THROUGH PL 111-201, APPROVED 7/7/2010 ***

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 155. INJUNCTIONS; THREE-JUDGE COURTS

Go to the United States Code Service Archive Directory

28 USCS § 2283

NITA Commentary:

Review expert commentary from The National Institute for Trial Advocacy

§ 2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

History:

(June 25, 1948, ch 646, 62 Stat. 968.)

History; Ancillary Laws and Directives:

Prior law and revision

Based on title 28, U.S.C., 1940 ed., § 379 (Act March 3, 1911, ch 231, § 265, 36 Stat. 1162).

An exception as to Acts of Congress relating to bankruptcy was omitted and the general exception substituted to cover all exceptions.

The phrase "in aid of its jurisdiction" was added to conform to section 1651 of this title and to make clear the recognized power of the Federal courts to stay proceedings

Practitioner's Toolbox

9th Circuit Case Number(s) 10-55769

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) [ ].

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) [ ]

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) [July 21, 2010].

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

James R. Touchstone, Counsel for City of Costa Mesa

Signature (use "s/" format) /s/ Daniel S. Roberts