No. 10-55769

IN THE 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 and THE CITY OF LAKE FOREST,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN RESPONSE TO THIS COURT'S INVITATION

THOMAS E. PEREZ
TONY WEST
Assistant Attorneys General

MARK L. GROSS
ROSCOE JONES, JR.
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-7347

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

STATUTES (continued): **PAGE**

REGULATIONS:

LEGISLATIVE HISTORY:

RULES:

MISCELLANEOUS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-55769

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

Plaintiffs-Appellants

v.

THE CITY OF COSTA MESA and THE CITY OF LAKE FOREST,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN RESPONSE TO THIS COURT'S INVITATION

This brief is filed in response to the Court's invitation of April 20, 2011, to the Department of Justice to express the views of the United States.

STATEMENT OF THE ISSUE

This Court invited the United States to address the following question:

Whether the term "illegal use of drugs," as defined in 42 U.S.C 12210(d), includes the use of marijuana taken under a doctor's supervision.[1]

STATEMENT OF FACTS AND OF THE CASE

1. The question the Ninth Circuit invited the United States to address arises under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, a federal civil rights statute. It also has implications for the enforcement of the Controlled Substances Act (CSA), 21 U.S.C. 801 *et seq.*, a comprehensive federal scheme enacted to regulate the manufacture, distribution, and possession of controlled substances.

a. Congress enacted the ADA to eliminate "discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). It covers three areas of discrimination against people with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities in the operation of public services, programs, and activities; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities.

[1] In this brief, the United States addresses only the question posed by this Court in its invitation. This brief does not address other issues that may be relevant to the disposition of this appeal.

This case involves a suit under Title II. Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is defined to include "any State or local government" and its components. 42 U.S.C. 12131(1)(A) and (B).

A disability can include past drug addiction. 42 U.S.C. 12114; see also 28 C.F.R. 35.104. The term "qualified individual," however, "does not include an individual 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. 12114(a).[2] In turn,

> 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*.]. 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 [21 U.S.C. § 801 *et* seq.] or other provisions of Federal law.

[2] An individual who no longer engages in illegal drug use may be a "qualified individual with a disability" if he or she has been successfully rehabilitated or participates in a supervised rehabilitation program. 42 U.S.C. 12114(b)(1) and (2). An individual may also be considered a "qualified individual with a disability" if he or she "is erroneously regarded as engaging in [illegal drug use], but is not engaging in such use." 42 U.S.C. 12114(b)(3).

42 U.S.C. 12210(d)(1). Section 12210(d) defines the term "drug" to mean "a controlled substance, as defined in Schedules I through V of Section 202 of the [CSA] [21 U.S.C.A § 812]," 42 U.S.C. 12210(d)(2), which includes marijuana.

b. The CSA makes it unlawful to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense" any controlled substance, "[e]xcept as authorized by [21 U.S.C. 801-904]." 21 U.S.C. 841(a)(1). The CSA similarly makes it a crime to possess any controlled substance except as authorized by the Act. 21 U.S.C. 844(a). Anyone who violates the CSA is subject to criminal and civil penalties, see 21 U.S.C. 841-864, and ongoing or anticipated violations may be enjoined. 21 U.S.C. 882(a).

The CSA classifies controlled substances in five schedules. The listing of a substance in a particular schedule depends on the extent to which the drug has a currently accepted medical use, the level of its potential for abuse, and the degree of psychological or physical dependence to which its use may lead. 21 U.S.C. 812(b). The Act imposes restrictions on the manufacture, distribution, and possession of the substance according to the schedule in which it has been placed. See 21 U.S.C. 821-829.

A drug is included in Schedule I, the most restrictive schedule, if it "has a high potential for abuse," "has no currently accepted medical use in treatment in the United States," and has "a lack of accepted safety for use * * * under medical

supervision." 21 U.S.C. 812(b)(1)(A)-(C). A drug is included in Schedule II if it "has a high potential for abuse," but "has a currently accepted medical use in treatment in the United States" or "a currently accepted medical use with severe restrictions." 21 U.S.C. 812(b)(2)(A) and (B). Schedules III through V consist of drugs that similarly have "a currently accepted medical use in treatment in the United States," 21 U.S.C. 812(b)(3)(B), (4)(B) and (5)(B), but have a lower potential for abuse and a more limited degree of dependence than drugs listed in the preceding schedules. 21 U.S.C. 812(b)(3)-(5).

When it enacted the CSA in 1970, Congress placed certain substances in each of the schedules. Pub. L. No. 91-513, Tit. II, § 202, 84 Stat. 1248-1252, see 21 U.S.C. 812(a). Congress classified marijuana as a Schedule I drug, see 84 Stat. 1249 (Schedule I(c)(10)), and that classification still stands. See 21 U.S.C. 812(c) (Schedule I(c)(10)).

Under the CSA, the possession, distribution, and dispensing of a controlled substance is presumptively illegal unless expressly permitted. See *United States* v. *Moore*, 423 U.S. 122, 141 (1975). The CSA establishes a "closed" system of drug distribution, under which all persons in the legitimate distribution chain (those who lawfully manufacture, distribute, and dispense controlled substances) must be registered with the Drug Enforcement Administration (DEA) and maintain records

to account strictly for all transactions. H.R. Rep. No. 1444, Pt. 1, 91st Cong., 2d Sess. 3-4, 6 (1970); see also *Moore*, 423 U.S. at 135.

Schedule I substances generally may be lawfully possessed, distributed, or dispensed only for the purpose of conducting research by practitioners who are registered with the DEA, following a determination by the Secretary of Health and Human Services (HHS) that the researcher is qualified and the research protocol is meritorious. 21 U.S.C. 823(f); see *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490 (2001) ("For marijuana (and other drugs that have been classified as 'schedule I' controlled substances), there is but one express exception, and it is available only for Government-approved research projects, §823(f)"). By contrast, drugs in Schedules II through V may be dispensed directly to a patient or by prescription. 21 U.S.C. 829. Practitioners and pharmacies must be registered with the DEA to write and fill such prescriptions. 21 U.S.C. 823(f); 21 C.F.R. Pt. 1301; see 21 U.S.C. 802(10) (defining "dispense" as "to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance").

c. The CSA contains congressional findings and declarations regarding the effects of drug distribution and use on the public health and welfare. After stating that "[m]any of the drugs included within [the CSA] have a useful and legitimate

medical purpose and are necessary to maintain the health and general welfare of the American people," 21 U.S.C. 801(1), Congress found that "[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people." 21 U.S.C. 801(2).

In a statutory provision enacted in 1998 entitled "NOT LEGALIZING MARIJUANA FOR MEDICINAL USE," Congress reaffirmed these findings and declared that "certain drugs are listed on Schedule I of the [CSA] if they have a high potential for abuse, lack any currently accepted medical use in treatment, and are unsafe, even under medical supervision." Pub. L. No. 105-277, Div. F., 112 Stat. 2681-2760. Congress also stated at that time that it "continues to support the existing Federal legal process for determining the safety and efficacy of drugs and opposes efforts to circumvent this process by legalizing marijuana, and other Schedule I drugs, for medicinal use without valid scientific evidence and the approval of the [FDA]." *Ibid*.

d. Under California law, while it is generally illegal to grow, possess, or distribute marijuana, Cal. H&S Code 11357-11360, voters have established exceptions for a patient or caregiver "who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." *Id*. § 11362.5(d); see also *id*. § 11362.775(d). That

has led to the establishment of "marijuana collectives," see *id*. § 11362.775(d), which distribute marijuana to individuals who have a doctor's recommendation.

2. On April 2, 2010, plaintiffs, California residents who wish to use marijuana that their doctors have prescribed or recommended, filed suit in the Central District of California against the Cities of Lake Forest and Costa Mesa, seeking injunctive and declaratory relief barring those cities' exclusion of medical marijuana[3] dispensaries within their respective borders. Doc. 1 at 1-6.[4] Plaintiffs allege that the elimination of such dispensaries violates Title II of the ADA. Doc. 21 at 2.

The Cities of Lake Forest and Costa Mesa either ban or have placed moratoria on marijuana collectives. Doc. 21 at 3-4. State law prohibits individuals from seeking legal access to medical marijuana from any method other than through marijuana collectives or cooperatives. See Cal. H&S Code 11362.775. Thus, if the local zoning ordinances in the cities that ban or place moratoria on state-mandated marijuana collectives are allowed to have effect, plaintiffs allege, they would have no legal access to the marijuana on which they allegedly depend

---

[3] As used in this brief, the term "medical marijuana" refers to marijuana consumed by an individual purportedly for medicinal purposes under conditions described in California law. See Cal. H&S Code 11362.5(d).

[4] "Doc. __" refers to the document number as entered in the district court.

to alleviate their symptoms. Doc. 21 at 4.

Plaintiffs moved for a preliminary injunction. Doc. 21 at 4. The main issue in contention between the parties was whether plaintiffs are "qualified individual[s] with a disability" under the ADA, when that term generally does not include individuals who are currently engaged in illegal drug use. Plaintiffs argued that they are not currently engaging in the "illegal use of drugs" as defined in Section 12210(a) because their use is under the supervision of doctors, and therefore falls within Section 12210(d)'s exception for "use of a drug taken under supervision by a licensed health care professional." Doc. 21 at 6.

3. On April 30, 2010, the district court denied preliminary injunctive relief, holding that relief was precluded under 42 U.S.C. 12210. Doc. 21 at 7. The court held that the use of medical marijuana is illegal under federal law, and thus is illegal under the ADA. Doc. 21 at 5-7.

The district court began its analysis by addressing the legal standards governing the current use of marijuana. The court recognized that, under the ADA, individuals currently engaged in illegal drug use do not qualify as "individuals with a disability" on the basis of such use. Doc. 21 at 5. The court also recognized that marijuana, a Scheduled I controlled substance, cannot be lawfully prescribed under the CSA. Doc. 21 at 5-6. The court emphasized that

"for Plaintiffs' argument to succeed the ADA must authorize, independent of the [CSA], Plaintiffs' use of marijuana under a doctor's supervision." Doc. 21 at 6.

The district court concluded that plaintiffs did not satisfy that standard. It rejected plaintiffs' argument that their use qualifies as "use of a drug taken under supervision by a licensed health care professional," reasoning that the first clause "must be read in context with the next clause in sequence," which shows that both clauses "require[] authorization from the [CSA], which * * * exists for some drugs, but not marijuana." Doc. 21 at 6. Plaintiffs argued that the use of the conjunction "or" to join the clauses demanded independent meaning from the two clauses. The court found that argument unavailing. It explained that its interpretation did give the clauses independent meaning in that the first clause covered prescriptions and the second clause covered "all of the 'other' authorized uses in the [CSA] besides a prescription." Doc. 21 at 7.

SUMMARY OF ARGUMENT

The proper interpretation of the term "illegal use of drugs," as defined in 42 U.S.C. 12210(d), includes the use of marijuana taken under doctor supervision, unless that use is authorized by the CSA or another federal law, which is not the case here. Federal law makes clear that medical marijuana use does not receive special protection under the ADA.

1. The text and structure of the Controlled Substances Act (CSA) establish that any use of marijuana by an individual must be authorized by the CSA. By classifying marijuana as a Schedule I controlled substance under the CSA, Congress has declared that marijuana has no "currently accepted medical use in treatment in the United States" and has no "accepted safety for use * * * under medical supervision." 21 U.S.C. 812(b)(1)(B) and (C). Congress in the CSA thus has banned the distribution of marijuana for any purpose, including purported medical use, except in the context of federally approved research. See 21 U.S.C. 823(f). Controlling authority makes clear that the use of medical marijuana by an individual is illegal under *federal* law in all circumstances throughout the United States.

2. Nor does the ADA treat matters differently. The central phrase in dispute – the "use of a drug taken under supervision by a licensed health care professional" – is best read, as the district court read it, not to embrace the use of marijuana for claimed medical purposes when that use is not authorized by the CSA.

First, as the district court properly recognized, the use of the term "other" in Section 12210(d)(1)'s second clause ("or other uses authorized by the Controlled Substances Act") strongly suggests that if that clause requires CSA authorization, then so does the former clause ("the use of a drug taken under supervision by a licensed health care professional"). 42 U.S.C. 12210(d)(1). Second, the context of

the statute, which mentions the CSA by name twice and includes a definition of "drugs" in the statute that expressly refers to the CSA, likewise suggests that the CSA supplies the frame of reference for interpreting Section 12210(d). Third, the structure of Section 12210(d), which mirrors the CSA's prohibition on the uses of controlled substances that are not expressly authorized, likewise signals that the CSA is the appropriate interpretive guide. Thus, the text, structure, and context of Section 12210(d) all suggest that the CSA should be used to interpret "the use of a drug taken under supervision by a licensed health care professional" clause. 42 U.S.C. 12210(d)(1).

When read in the context of the CSA, Section 12210(d)'s "the use of a drug taken under supervision by a licensed health care professional" clause has a specific meaning. It means the use of a drug prescribed or otherwise dispensed by a DEA-registered practitioner, and that meaning corresponds with established CSA concepts. Thus, because the CSA prohibits a practitioner from either prescribing or dispensing marijuana for any purpose other than research authorized by the DEA, marijuana generally does not fall under Section 12210(d)'s protections.

3. Plaintiffs' arguments are unavailing. Plaintiffs argue that the "use of a drug taken under supervision by a licensed health care professional" clause is not to be understood by reference to the CSA. But plaintiffs offer no affirmative theory of what the clause means. If plaintiffs believe the clause means the use of

any drug under the supervision-in-fact by any state-licensed health care professional, then their interpretation not only ignores federal law, but would produce absurd results. For example, plaintiffs' theory would turn the ADA into a mandate for access to any purported medical treatment that could be characterized as a reasonable accommodation. To avoid an absurd result, plaintiffs would have to argue that the clause includes a requirement that the use be in conformity with state, rather than federal, law. But there is no indication that the statute distinguishes between state and federal law in that way. Moreover, if Congress had wanted Section 12210(d) to turn on the peculiarities of state law, it would have said so.

In addition, contrary to plaintiffs' contention that the Executive Branch has approved the use of medical marijuana when such use complies with state law, the Department's internal guidance does not "legalize" marijuana nor does it recognize and state a position on a legal defense to a violation of federal law. Rather, it underscores the Department's position that the use of medical marijuana remains illegal under federal law, even if the activity "purports to comply with state law." Thus, the district court's conclusion that medical marijuana use does not receive special protection under the ADA is consistent with the Department's position that such use remains illegal under the CSA, irrespective of state law. Plaintiffs' other arguments similarly fail.

ARGUMENT

THE DISTRICT COURT DID NOT ERR IN HOLDING THAT THE ADA DOES NOT PROVIDE AN EXCEPTION FOR THE USE OF MARIJUANA TAKEN UNDER A DOCTOR'S SUPERVISION, WHERE SUCH USE IS NOT AUTHORIZED BY FEDERAL LAW

A. The Text And Purpose Of The CSA Establish That Use Of Marijuana Unauthorized By The CSA Violates Federal Law

The CSA declares that "[t]he illegal * * * distribution[] and * * * improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people." 21 U.S.C. 801(2). The CSA therefore makes it unlawful to "manufacture, distribute, or dispense" any controlled substance, "[e]xcept as authorized by" the Act itself. 21 U.S.C. 841(a)(1); see *United States* v. *Moore*, 423 U.S. 122, 131, 135 (1975). Federal law makes the use of a Schedule I drug illegal unless the person handling the drug is registered with the DEA to conduct research, and that researcher is carrying out a protocol that HHS has determined to be scientifically meritorious, 21 U.S.C. 823(f).

Since the enactment of the CSA in 1970, marijuana has been classified as a Schedule I drug, a classification that means that marijuana has been found to have a "high potential for abuse," "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use * * * under medical supervision." 21 U.S.C. 812(b)(1). In the 1998 legislation entitled "NOT

LEGALIZING MARIJUANA FOR MEDICINAL USE," Congress reiterated those findings, and reaffirmed its view that Schedule I drugs are "unsafe, even under medical supervision," and that the CSA makes it "illegal to manufacture, distribute, or dispense marijuana." Pub. L. No. 105-277, Div. F., 112 Stat. 2681-2760. Moreover, the CSA unequivocally provides that, as a Schedule I drug, marijuana may not be dispensed to, or used by, any individual outside of a strictly controlled research project that has been registered with the DEA and approved by the FDA. 21 U.S.C. 355(i); 21 U.S.C. 823(f).

The Supreme Court's recent decisions confirm that the CSA is binding federal law even when it renders unlawful the use of medical marijuana deemed permissible under state law. For example, *United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001), held that, under the CSA, there can be no lawful order for an individual to receive a Schedule I substance outside of the narrow confines of government authorized research. *Id*. at 489-491; see *id*. at 492-493 (upholding federal determination in the CSA that marijuana lacks an acceptable medical use, despite state law purporting to recognize such medical use); *Moore*, 423 U.S. at 139, 141-143 (recognizing that "provisions throughout the Act reflect the intent of Congress to confine authorized medical practice within accepted limits," and upholding CSA conviction based upon a finding that the physician's "experiment[al] * * * theory of detoxification" was not "in accordance

with a standard of medical practice generally recognized and accepted in the United States").

In *Oakland Cannabis*, the Court considered a ballot initiative passed by California voters that established that seriously ill Californians could "use marijuana for medical purposes" for purposes of state law, the very ballot initiative that led to the creation of the cooperatives at issue here. 532 U.S. at 486 (citation omitted). The Court rejected a marijuana cooperative's reliance on state law to support a "medical necessity" defense to a federal prosecution under the CSA. The Court held that such a defense would be inconsistent with Congress's finding, in classifying marijuana in Schedule I, that the substance has "no currently accepted medical use in treatment in the United States." *Id*. at 492, see *id*. at 493 (notwithstanding state law, "Congress has made a determination that marijuana has no medical benefits worthy of an exception," and neither the State nor the Court could "override a legislative determination" to that effect).

Similarly, the Supreme Court's decision in *Gonzales* v. *Raich*, 545 U.S. 1 (2005), demonstrates that medical marijuana users violate federal law when they possess marijuana. The question presented in *Raich* was whether Congress has the constitutional authority, pursuant to the Commerce Clause, to prohibit the local cultivation and use of marijuana even when done in compliance with a state law. *Id*. at 5. Answering that question in the affirmative, the Court upheld the CSA's

blanket prohibition on marijuana use despite California's recognition of its medicinal utility. Because "[i]t is beyond peradventure that federal power * * * is superior to that of the States," *id*. at 29 (internal quotation marks omitted), the Court held that the mere use of "locally cultivated product" does not shield an individual from federal prosecution. *Id*. at 32. The Court acknowledged that because "Congress expressly found that the drug has no acceptable medical uses," the "CSA designates marijuana as contraband for *any* purpose." *Id*. at 27.

B. The Text, Structure, And Context Of Section 12210(d) All Confirm That The Meaning Of The "Under Supervision" Clause Conforms With The Dispensing And Prescription Requirements Of The CSA

Section 12210(d) provides:

> The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the [CSA] [21 U.S.C.A. § 801 *et seq*.]. 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 [CSA] [21 U.S.C.A. § 801 *et seq.*] or other provisions of Federal law.

42 U.S.C. 12210(d)(1). This Court has asked whether the term "illegal use of drugs," as defined in 42 U.S.C 12210(d), includes the use of marijuana taken under a doctor's supervision. The answer is yes, unless that use is authorized by the CSA or another federal law. As described below, the text, context, and structure of Section 12210(d) all confirm that the "use of a drug taken under supervision by a licensed health care professional" clause means use of a controlled substance

dispensed by a DEA-registered practitioner in conformity with the CSA's dispensing and prescription requirements.

1. The Text, Structure, And Context Of Section 12210(d) All Suggest That The CSA Should Be Used To Interpret The "Use Of A Drug Taken Under Supervision By A Licensed Health Care Professional" Clause

The district court held that the best interpretation of Section 12210(d) is that any authorization for the use of controlled substances must come from the federal law addressed to controlled substances. That reading of the statute is correct.

The use of the word "other" in the second clause of the statute offers ample support for the district court's conclusion. As the district court properly recognized, the use of "other" in the second clause ("or other uses authorized by the [CSA]") implies that what went before was also a "use[] authorized by the CSA." See *Webster's Third New International Dictionary, Unabridged* 1598 (1993) (defining "other" as "additional"). In other words, if the latter clause requires CSA authorization ("or other uses authorized by the CSA"), then so does the former clause ("use of a drug taken under supervision by a licensed health care professional"). 42 U.S.C. 12210(d)(1). This context suggests that *ejusdem generis* (or *noscitur a sociis*) is the appropriate canon of construction. *Cf. Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-115 (2001) ("[W]here general words follow specific words in a statutory enumeration, the general words are construed

to embrace only objects similar in nature to those objects enumerated by the preceding specific words."). And, as the district court correctly found, plaintiffs' reading of the statute would give no effect to the word "other" in Section 12210(d). See *United States* v. *Luna-Madellaga*, 315 F.3d 1224, 1230 (9th Cir.) (cautioning courts to avoid "any statutory interpretation that renders any section superfluous and does not give effect to all of the words used by Congress") (citation omitted), cert. denied, 540 U.S. 853 (2003).

The context likewise suggests that the CSA supplies the frame of reference for interpreting Section 12210(d). Not only does Section 12210(d) mention the CSA by name twice, but the definition of "drugs" in the statute refers to the CSA. The statute defines "drug" to mean "a controlled substance, as defined in Schedules I through V of Section 202 of the [CSA] [21 U.S.C. § 812]," 42 U.S.C. 12210(d)(2), and marijuana, as stated previously, is a Schedule I drug.

The structure of Section 12210(d) likewise signals that the CSA is the appropriate interpretive guide. Section 12210(d), like the CSA, is structured to exclude those uses of controlled substances that are not expressly authorized: the first sentence parallels the CSA, in that it lumps all uses of controlled substances together. *Cf.* 42 U.S.C. 12210(d)(1); 21 U.S.C. 841(a)(1). The CSA then writes exceptions to that. See 21 U.S.C. 841(a)(1); see also *Moore*, 423 U.S. at 141 (quoting H.R. Rep. No. 1444, Pt. 1, 91st Cong., 2d Sess. 3 (1970)). Similarly, the

ADA provision has exceptions in the second sentence. See 42 U.S.C. 12210(d)(1). Because of the parallel between the two statutes, it makes sense to look to the CSA for guidance in how to interpret both the exclusion from ADA protection in the first sentence of Section 12210(d) and the exceptions in the second sentence.

2. Section 12210(d)(1)'s The "Use Of A Drug Taken Under Supervision By A Licensed Health Care Professional" Clause Means The Use Of A Drug Dispensed By A DEA-Registered Practitioner In Conformity With The CSA's Dispensing And Prescription Requirements

The "use of a drug [1] taken under supervision by [2] a licensed [3] health care professional" has a specific meaning in the context of the CSA. The three bracketed criteria correspond to established concepts in the CSA. First, "tak[ing] [a drug] under supervision" is described by 21 U.S.C. 829, which requires direct dispensing by a practitioner or a prescription. The prescription requirements vary according to the drug's schedule (*e.g.*, Schedule II prescriptions are non-refillable; Schedule III prescriptions have limited refills), and the CSA requires in-person medical examinations for some prescriptions. 21 U.S.C. 829 (a), (b), (e)(1) and (2). All those are efforts at ensuring supervision of the drug's use. Second, "licens[ing]" is found in 21 U.S.C. 823(f), which requires practitioners to register with DEA for authorization to dispense controlled substances. Third, the term "health care professional" equates to "practitioner" under 21 U.S.C. 802(21). Thus, the "use of a drug taken under supervision by a licensed health care

professional" clause can be phrased in the jargon of the CSA as "the use of a drug prescribed or otherwise dispensed by a registered practitioner." Because marijuana is a Schedule I drug that the CSA prohibits a practitioner from either prescribing or dispensing for any purpose other than research authorized by the DEA, see 21 U.S.C. 823(f); 21 U.S.C. 829, the use of marijuana generally does not fall under Section 12210(d)'s protections.

3. This Court Has Interpreted Section 12210(d) To Not Protect Medical Marijuana

Consistent with the ADA's text and structure, this Court has similarly recognized that Section 12210(d)'s exemption to the statute's general prohibition against the current use of illegal drugs does *not* apply to marijuana. In *Assenberg* v. *Anacortes Housing Authority*, 268 F. App'x 643 (9th Cir.) (unpublished), cert. denied, 129 S. Ct. 104 (2008), this Court held that an individual could be evicted based on the individual's marijuana use for purported medical purposes. *Id*. at 644. The Court stated that "[t]he Fair Housing Act, Americans with Disabilities Act, and the Rehabilitation Act all expressly exclude illegal drug use, and [defendant] did not have a duty to reasonably accommodate [plaintiff's] medical marijuana use." *Ibid.* This unpublished disposition, while not precedential, may be cited when relevant. See Fed. R. App. P. 32.1 and Ninth Cir. R. 36-3.

This Court's holding that Section 12210(d) does not protect the use of medical marijuana is consistent with the CSA. There are scheduled controlled substances – other than marijuana used for medical purposes – that *would* fall under Section 12210(d)(1)'s exception for the "use of a drug taken under supervision by a licensed health care professional." 42 U.S.C. 12210(d)(1). For example, Schedule II-V drugs, such as oxycodone, are protected under this exception because DEA-registered practitioners must, and legally can, prescribe, administer, or dispense the drug. See 21 U.S.C. 802(10); 21 U.S.C. 823(f). Likewise, Schedule I drugs, such as marijuana, may be taken under a DEA-registered practitioner's supervision but *only* when the drugs are used for authorized research purposes, *i.e.*, the CSA requires individuals conducting research with Schedule I drugs to be registered practitioners. See 21 U.S.C. 823(f). Thus, even marijuana would fall under Section 12210(d)(1)'s exception *if* the drug is taken pursuant to research authorized under the CSA. But outside the context of authorized research, marijuana taken for a claimed "medical" purpose is not authorized under the CSA and, thus, cannot qualify the user for the exception for current drug use stated in Section 12210(d) of the ADA.

C. Plaintiffs' Arguments To The Contrary Fail

Plaintiffs make several arguments in support of their contention that Section 12210(d) protects the use of medical marijuana. Specifically, they contend that (1)

"the use of a drug taken under supervision by a licensed health care professional" is not to be understood by reference to the CSA; (2) the use of the conjunction "or" to join the clauses demands independent meaning from the two clauses; (3) the Department's own guidance provides for the legalization of medical marijuana; and (4) that their medical marijuana use is authorized by "other provisions of Federal law." Br. 7-55. Each argument fails.

1. Plaintiffs Offer No Affirmative Vision Of The Meaning Of The "Use Of A Drug Taken Under Supervision By A Licensed Health Care Professional"

First, plaintiffs rely on various grammatical arguments to assert (Br. 9-29) that the "use of a drug taken under supervision by a licensed health care professional" clause is not to be understood by reference to the CSA. For the reasons explained above, that assertion is incorrect. In any event, plaintiffs offer no persuasive affirmative theory of what the clause means. Perhaps plaintiffs believe it is satisfied by use of any drug under the supervision of any state-licensed health care professional, irrespective of whether that use is lawful under *either* federal or state law. But that interpretation produces absurd results. See *United States* v. *Brown*, 333 U.S. 18, 27 (1948) (applying the canon against reading general language in a statute to produce absurd results). For one thing, plaintiffs' case would not turn on California's treatment of marijuana, so they could seemingly seek a similar accommodation anywhere in the country, with

respect to any controlled substance on any CSA schedule, turning the ADA into a mandate for access to any purported medical treatment that could be characterized as a reasonable accommodation. There is nothing to suggest Congress intended the ADA to reach so far.

To avoid that absurdly far-reaching result, plaintiffs would have to argue that the clause includes (either implicitly or perhaps through the term "license") a requirement that the use be in conformity with state law, but no requirement that the use be in conformity with federal law. But nothing in the statute's text distinguishes between state and federal law in that way, and there is no evident reason why Congress would want to elevate state law over federal law in a manner considerably in tension with the accepted principle that compliance with state medical marijuana laws is no defense to the CSA. See *Raich*, 545 U.S. at 32. Furthermore, if Congress had wanted Section 12210(d) to turn exclusively on the peculiarities of state law, it would have said so clearly, as it has in many other statutes.[5] Here, Section 12210(d)(1) contains no clear reference to state law.

---

[5] See, *e.g.*, 18 U.S.C. 2266(7) (defining "intimate partner" to include "any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State or tribal jurisdiction in which the injury occurred or where the victim resides"); 18 U.S.C. 1161 (prohibiting liquor into Indian country unless "any act or transaction * * * in conformity both with the laws of the State in which (it) occurs and with an ordinance duly adopted by the tribe having jurisdiction"); 21 U.S.C. 823(f) ("The Attorney General shall register practitioners

(continued…)

Indeed, to interpret any provision of Section 12210(d)(1) to be satisfied by compliance with state law alone would be an especially odd approach for a federal statute that aims to override certain state laws, as Title II does. See 42 U.S.C. 12202. Thus, plaintiffs offer no viable affirmative vision of what the "use of a drug taken under supervision by a licensed health care professional" clause means.

2. The District Court's Reading Of Section 12210(d) Does Not Render The "Use Of A Drug Taken Under Supervision By A Licensed Health Care Professional" Clause Superfluous

Second, plaintiffs' contention (Br. 22) that the district court's reading of Section 12210(d) would render the "the use of a drug taken under supervision by a licensed health care professional" clause superfluous is unavailing. In particular, plaintiffs contend (Br. 25, 29) that because Section 12210(d) places a comma between clauses and uses the disjunctive – "a licensed health care professional, or other uses" – the necessary implication is that the statute contains "two independent clauses." But the term "or" can have either a conjunctive or a disjunctive meaning depending on context. See *Webster's*, *supra*, at 1585

(…continued)
* * * if the applicant is authorized to dispense * * * controlled substances under the laws of the State in which [it] practices."); see also 28 U.S.C. 1346(b)(1) (the Federal Tort Claims Act measures the government's liability by referencing "the law of the place where the act or omission occurred").

(defining "or" to mean either a "choice between alternative things" or "synonymous, equivalent, or substitutive character of two words or phrases").

In any event, the district court properly recognized that "the use of a drug taken under supervision by a licensed health care professional" clause is not redundant, because it covers only "other" (*i.e.*, not previously enumerated) uses. See Doc. 21 at 7 (explaining that the word "other" "encompasses all of the 'other' authorized uses in the [CSA] besides a prescription by a doctor"). At worst, Congress can be accused of splitting into two what might have been said in one provision. But Congress can legitimately decide to address expressly the situation that would arise most frequently (the individual who is unjustly discriminated against because he or she uses a legitimate prescription controlled substance), while including a catch-all aimed at "other uses" authorized by existing or yet-to-be-enacted laws. Congress often writes statutes to describe a particular example and then includes a catch-all provision to capture similar but unenumerated matters. See, *e.g.*, 8 U.S.C. 1182(a)(9)(A)(ii) (alien is inadmissible to enter the United States if, *inter alia*, he or she "has been ordered removed under section 1225(b)(1) of this title or any other provision of law"). Thus, the district court's reading of Section 12210(d) does not render the "use of a drug taken under supervision by a licensed health care professional" clause superfluous.

3. Federal Medical Marijuana Guidance Does Not Legalize Marijuana Nor Does It Provide A Defense To A Violation Of Federal Law

Third, plaintiffs contend (Br. 44) that the Executive Branch "has approved the legalization of medical marijuana." Citing the Department's 2009 Guidance,[6] plaintiffs contend (Br. 43) that "the Executive Branch directed federal prosecutors *not* to target marijuana using patients or their sanctioned suppliers in states that allow medical use of the drug." But that argument is mistaken. Contrary to plaintiffs' suggestion, the Department's guidance simply states that the focus of federal prosecutorial resources should be directed toward the disruption of illegal drug manufacturing and trafficking networks, and that this federal policy would ordinarily not be advanced by the prosecution of individuals who are in clear

[6] The Department's position is that transactions in medical marijuana remain unlawful under the CSA notwithstanding state law. The Department has also indicated that prosecutorial resources should be directed toward the disruption of illegal drug manufacturing and trafficking networks, while recognizing that prosecution of individuals with serious illnesses who use medical marijuana is unlikely to be an efficient use of limited prosecutorial resources. See Memorandum from the Deputy Attorney General to the U.S. Attorneys, *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana* (Oct. 19, 2009) (2009 Guidance), *available at* http://www.justice.gov/opa/documents/medical-marijuana.pdf. The guidance reiterates that the Department is committed to the enforcement of the CSA in all States, and that the guidance does not "legalize" marijuana or provide for legal defense to a violation of federal law. 2009 Guidance at 1-2. And it underscores that the Department will continue to prosecute people whose claims of compliance with state and local law conceal operations inconsistent with the terms, conditions, or purposes of the law. 2009 Guidance at 2.

compliance with state medical marijuana laws. 2009 Guidance, *supra*, at 1-2. And the guidance expressly states that the Department is committed to the enforcement of the CSA throughout the United States, and that this guidance neither legalizes marijuana nor provides for legal defense to a violation of federal law. *Ibid*.

4. Plaintiffs' Use Of Medical Marijuana Is Not Protected By Congress's Decision Not To Implement An Appropriations Rider Banning The Use Of Medical Marijuana In The District Of Columbia

Finally, plaintiffs have advanced numerous arguments (Br. 33-54) to the effect that their medical marijuana use is authorized by "other provisions of Federal law" because Congress failed to include the traditional appropriations rider banning the District of Columbia from expending funds to implement a medical marijuana exception to the local D.C. Controlled Substances Act, D.C. Act 13-138, as amended. But these arguments are unavailing. Congress has done nothing to change marijuana's status as a Schedule I controlled substance under the federal CSA. See 21 U.S.C. 812(c) (Schedule I(c)(10)). Moreover, whatever the local D.C. law might authorize in the District of Columbia, it could not authorize particular conduct in California.

CONCLUSION

This Court should adopt the position set forth in this amicus brief.

Respectfully submitted,

THOMAS E. PEREZ
TONY WEST
Assistant Attorneys General

s/ Roscoe Jones, Jr.
MARK L. GROSS
ROSCOE JONES, JR.
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-7347

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B) and 29(d). The brief was prepared using Microsoft Office Word 2007 and contains 6512 words of proportionately spaced text. The type face is Times New Roman, 14-point font.

s/ Roscoe Jones, Jr.
ROSCOE JONES, JR.
Attorney

Dated: August 2, 2011

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2011, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN RESPONSE TO THE COURT'S INVITATION with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system.

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

I further certify that on August 2, 2011, I served a copy of the foregoing brief on the following counsel of record by First Class Mail:

James R. Touchtone
JONES & MAYER
3777 N. Harbor Blvd.
Fullerton, CA 92835

s/ Roscoe Jones, Jr.
ROSCOE JONES, JR.
Attorney