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CASE SUMMARY

STATE AND FEDERAL POWERS CLASH OVER MEDICAL MARIJUANA IN *UNITED STATES V. MCINTOSH*

CARA E. ALSTERBERG*

INTRODUCTION

The unanimous opinion in *United States v. McIntosh* held that a spending rider approved by Congress in 2014 and 2015 prohibits the United States Department of Justice (the Department) from prosecuting marijuana suppliers who fully comply with state laws allowing the use of marijuana for medicinal purposes.¹ The Department argued that the rider only prohibits litigation against the states themselves, rather than prosecution of individuals who provide marijuana for medicinal purposes, because the language of the rider indicates that the Department may not use appropriated money to prevent *states* from implementing their medical marijuana laws.²

The three-judge panel of the United States Court of Appeals for the Ninth Circuit rejected this interpretation, holding that the rider prohibits the Department from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by state medical marijuana laws and who fully complied with such laws.³ Individuals who do not strictly comply with all state-law conditions regarding the use, distribution, possession, and cultivation of medical mari-

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¹ *United States v. McIntosh*, 833 F.3d 1163, 1168 (9th Cir. 2016).

² *Id.* at 1176.

³ *Id.* at 1178.

juana, on the other hand, have engaged in conduct that is unauthorized.⁴ Thus, prosecuting individuals such as these does not violate the rider.⁵ However, if the Department wishes to continue these prosecutions, the defendants are entitled to evidentiary hearings at which they may demonstrate that their actions were authorized by state law.⁶ The Ninth Circuit's ruling represents the highest judicial holding that this omnibus legislation does indeed curb federal crackdowns on state-legal medical marijuana programs.⁷

I. FACTUAL AND PROCEDURAL HISTORY

In 10 consolidated interlocutory appeals and petitions for writ of mandamus arising from three district courts in two states, the panel vacated the district court's orders denying relief to the appellants.⁸ The appellants had been indicted for violating the Controlled Substances Act, and sought dismissal of their indictments or to enjoin their prosecutions on the basis of a congressional rider that prohibits the Department from spending funds to prevent state's implementation of their medical marijuana laws.⁹

A. THE APPELLANTS¹⁰

In *McIntosh*, five codefendants ran four marijuana stores in the Los Angeles area known as Hollywood Compassionate Care (HCC) and Happy Days, and nine indoor marijuana grow sites in the San Francisco and Los Angeles areas.¹¹ In violation of 21 U.S.C. sections 846, 841(a)(1), and 841(b)(1)(A), these codefendants were indicted for conspiracy to manufacture, to possess with intent to distribute, and to distribute more than one thousand marijuana plants.¹²

⁴ Id.

⁵ Id. at 1179.

⁶ Id.

⁷ Hilary Bricken, *ICYMI: Ninth Circuit Rules DOJ Can't Stub Out Medical Marijuana Businesses*, ABOVE THE LAW (Aug. 20, 2016, 4:20 PM), <http://abovethelaw.com/2016/08/icymi-ninth-circuit-rules-doj-cant-stub-out-medical-marijuana-businesses/>.

⁸ *United States v. McIntosh*, 833 F.3d 1163, 1168 (9th Cir. 2016).

⁹ Id. at 1168-69.

¹⁰ Appellants filed one appeal in *United States v. McIntosh*, No. 15-10117, arising out of the Northern District of California; one appeal in *United States v. Kynaston*, No. 15-30098, arising out of the Eastern District of Washington; and four appeals with four corresponding petitions for mandamus—Nos. 15-10122, 15-10127, 15-10132, 15-10137, 15-71158, 15-71174, 15-71179, 15-71225, which are addressed as *United States v. Lovan*—arising out of the Eastern District of California.

¹¹ *United States v. McIntosh*, 833 F.3d 1163, 1169 (9th Cir. 2016).

¹² Id.

In *Kynaston*, five codefendants were charged with violating Washington's Controlled Substances Act.¹³ Allegedly, 562 marijuana plants alongside 677 pots with suspected root structures of harvested marijuana plants were found.¹⁴ The codefendants were indicted for conspiring to manufacture 1,000 or more marijuana plants, manufacturing 1,000 or more marijuana plants, possessing with intent to distribute 100 or more marijuana plants, and being felons in possession of a firearm in violation of 18 U.S.C. sections 922(g)(1), 924(c)(1)(A)(i) and 21 U.S.C. sections 841, 856(a)(1).¹⁵

In *Lovan*, the United States Drug Enforcement Agency and Fresno County Sheriff's Office executed a federal search warrant on 60 acres of land located in Sanger, California.¹⁶ Officials located more than 30,000 marijuana plants on this property.¹⁷ Four codefendants were indicted for manufacturing 1,000 or more marijuana plants and for conspiracy to manufacture 1,000 or more marijuana plants in violation of 21 U.S.C. sections 841(a)(1), 846.¹⁸

B. THE RIDER

From 2014 through the fiscal year ending on September 30, 2016, Congress enacted a rider currently known as Section 542 which appropriated government funds. In its current form, Section 542 states that:

None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, Wisconsin, Guam, and Puerto Rico to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.¹⁹

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *United States v. McIntosh*, 833 F.3d 1163, 1169 (9th Cir. 2016).

¹⁸ *Id.*

¹⁹ Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015).

The appellants filed motions to enjoin or dismiss their cases on the basis of this rider.²⁰ When the lower courts denied their motions, the appellants filed interlocutory appeals.²¹

II. NINTH CIRCUIT ANALYSIS

A. A UNIQUE CASE

“In almost all federal criminal prosecutions, injunctive relief and interlocutory appeals will not be appropriate.”²² Federal courts traditionally have refused, except in rare instances, to enjoin federal criminal prosecutions.²³ This case is one of those rare instances.

Federal courts are limited in power both by the Constitution and Congress, and therefore contain limited subject-matter jurisdiction. However, appellants invoked an avenue for the Court to reach the merits via “jurisdiction over an order refusing an injunction.”²⁴ Under 28 U.S.C. section 1292(a), “the courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, *refusing* or dissolving *injunctions*, . . . except where a direct review may be had in the Supreme Court.”²⁵

In each of the consolidated cases before the Court, the district courts had issued direct denials to the requests for injunctive relief.²⁶ While “an order by a federal court that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction and therefore is not appealable under § 1292(a)(1),” the appropriations rider here was specifically enacted by Congress to restrict the Department from spending money to pursue certain economic activities.²⁷ Even if the appellants could not obtain injunctions, they sought to enjoin the Department from spending funds from the relevant appropriations acts.²⁸ Therefore, the Court found that it had jurisdiction under 28 U.S.C. section 1292(a)(1) to consider the interlocutory appeals.

²⁰ United States v. McIntosh, 833 F.3d 1163, 1170 (9th Cir. 2016).

²¹ *Id.*

²² *Id.* at 1172.

²³ *Id.*

²⁴ *Id.* at 1173.

²⁵ 28 U.S.C. § 1292(a) (emphasis added); United States v. McIntosh, 833 F.3d 1163, 1170 (9th Cir. 2016).

²⁶ United States v. McIntosh, 833 F.3d 1163, 1172 (9th Cir. 2016).

²⁷ 28 U.S.C. § 1292(a)(1); United States v. McIntosh, 833 F.3d 1163, 1172 (9th Cir. 2016).

²⁸ United States v. McIntosh, 833 F.3d 1163, 1172 (9th Cir. 2016).

B. THE PROBLEM WITH UNBOUND POWER OVER THE PUBLIC PURSE

The Appropriations Clause plays a critical role in the Constitution's separation of powers among the three branches of government and the checks and balances between them.²⁹ The Clause has a "fundamental and comprehensive purpose . . . to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents."³⁰

The appellants complained that the Department was spending funds that had not been appropriated by Congress in violation of this Clause.³¹ If the Department were spending money in violation of Section 542, it would be drawing funds from the Treasury without authorization by statute and thus violating the Appropriations Clause.³² Without the Clause, "the executive would possess an unbounded power over the public purse of the nation; and might apply all its moneyed resources at his pleasure."³³ Ultimately, as an extension of the Executive Branch, the Department was reaching into that purse.

C. STRAIGHTFORWARD STATUTORY INTERPRETATION

1. *Let's Talk About Section 542*

The Court begins by looking at the statutory language of Section 542 to determine whether the Department's spending money on prosecuting private individuals violates the rider. "It is a 'fundamental canon of statutory construction' that, 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'"³⁴ Therefore, the Court's first step was to determine the plain meaning of "prevent any of [the Medical Marijuana States]³⁵ from implementing

²⁹ "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ." U.S. CONST. art. I, § 9, cl. 7.

³⁰ *United States v. McIntosh*, 833 F.3d 1163, 1175 (9th Cir. 2016) (quoting *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990)).

³¹ *United States v. McIntosh*, 833 F.3d 1163, 1174 (9th Cir. 2016).

³² *Id.* at 1175.

³³ *United States v. McIntosh*, 833 F.3d 1163, 1175 (9th Cir. 2016) (quoting *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990)).

³⁴ *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

³⁵ The "Medical Marijuana States" are the states and three territories listed in § 542.

their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”³⁶

Looking to the definitions in *Merriam-Webster* and the *Oxford English Dictionary* to define these words quoted above in their common meanings, the Court found that Section 542 prohibits the Department from spending money on actions that prevent the Medical Marijuana States giving practical effect to their state laws that authorize the use, distribution, possession, or cultivation of medical marijuana.³⁷

2. *Context is Key*

The Department attempted to rebut the Court’s holding by arguing that it does not prevent the Medical Marijuana States from giving practical effect to their medical marijuana laws.³⁸ Rather than taking legal action against the states, the Department prosecuted private individuals in an attempt to circumvent the rider.³⁹ However, the Court was not persuaded by this argument because “[s]tatutory language cannot be construed in a vacuum.”⁴⁰

The reading of Section 542 must be in light of its place in the overall statutory scheme for marijuana regulation, namely the Controlled Substances Act and the State Medical Marijuana Laws.⁴¹ The Controlled Substances Act prohibits the use, distribution, possession, or cultivation of any marijuana.⁴² And, the State Medical Marijuana laws *authorize* the use, distribution, possession, or cultivation of medical marijuana.⁴³ This means the Controlled Substances Act prevents exactly what the State Medical Marijuana Laws permit.

Therefore, the Court held that in the context of the relationship between relevant federal and state laws, the Department cannot attempt to circumvent the rider by taking legal action against private individuals within the Medical Marijuana States.⁴⁴

³⁶ Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015).

³⁷ *United States v. McIntosh*, 833 F.3d 1163, 1175-76 (9th Cir. 2016).

³⁸ *Id.*

³⁹ *Id.* at 1176.

⁴⁰ *United States v. McIntosh*, 833 F.3d 1163, 1176 (9th Cir. 2016) (quoting *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016)).

⁴¹ *United States v. McIntosh*, 833 F.3d 1163, 1176 (9th Cir. 2016).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 1176-77.

III. IMPLICATIONS OF THE DECISION

Judge O’Scannlain, the author for the panel, concludes the opinion with a practical observation. Do not be fooled to believe that the relevant statute means that federal law permits or authorizes one to possess marijuana because *it does not*.⁴⁵ “To be clear, § 542 does not provide immunity from prosecution for federal marijuana offenses.”⁴⁶ The Controlled Substances Act prohibits the manufacture, distribution, and possession of marijuana.⁴⁷ This means anyone in any state who possesses, distributes, or manufactures marijuana for medical or recreational purposes is committing a federal crime.⁴⁸ The federal government can still prosecute such offenses for up to five years after they occur.⁴⁹

There is also a temporal nature to the rider. Congress currently restricts the government from spending certain funds to prosecute private individuals. Yet, Congress could restore funding at any time, and the government could then prosecute individuals who committed offenses while the government lacked funding.⁵⁰ Moreover, with the election of a new president⁵¹ just around the corner, “a new administration could shift enforcement of priorities to place greater emphasis on prosecuting marijuana offenses.”⁵²

Additionally, no state law “legalizes” possession, distribution, or manufacture of marijuana. Under the Constitution’s Supremacy Clause, state laws cannot permit what federal law prohibits.⁵³ Therefore, while the Controlled Substances Act remains in effect, states cannot authorize the manufacturing distribution, or possession of marijuana.

Therefore, compliance with state law is turning out to be the essence for protection from criminal prosecution under these federal appropriation riders.⁵⁴ And passing a Medical Marijuana State’s tests may not be easy, since neither California nor Washington are licensed or explicitly

⁴⁵ *United States v. McIntosh*, 833 F.3d 1163, 1179 n.5 (9th Cir. 2016); Shaun Martin, *U.S. v. McIntosh*, THE CALIFORNIA APPELLATE REPORT (Aug. 16, 2016, 10:46 AM), <http://calapp.blogspot.com/2016/08/us-v-mcintosh-9th-cir-aug16-2016.html>.

⁴⁶ *United States v. McIntosh*, 833 F.3d 1163, 1179 n.5 (9th Cir. 2016).

⁴⁷ *Id.*

⁴⁸ *United States v. McIntosh*, 833 F.3d 1163, 1179 n.5 (9th Cir. 2016); Jacob Sullum, *9th Circuit Says Feds May Not Prosecute State-Legal Medical Marijuana Suppliers*, REASON.COM (Aug. 16, 2016, 6:30 AM), <http://reason.com/blog/2016/08/17/9th-circuit-says-feds-may-not-prosecute>.

⁴⁹ 18 U.S.C. § 3282.

⁵⁰ *United States v. McIntosh*, 833 F.3d 1163, 1179 n.5 (9th Cir. 2016).

⁵¹ This case summary was written prior to the November 8, 2016 election.

⁵² *United States v. McIntosh*, 833 F.3d 1163, 1179 n.5 (9th Cir. 2016).

⁵³ U.S. CONST. art. VI, cl. 2.

⁵⁴ Hilary Bricken, *ICYMI: Ninth Circuit Rules DOJ Can’t Stub Out Medical Marijuana Businesses*, ABOVE THE LAW (Aug. 20, 2016, 4:20 PM), <http://abovethelaw.com/2016/08/icymi-ninth-circuit-rules-doj-cant-stub-out-medical-marijuana-businesses/>.

allowed commercial production and distribution of medical marijuana.⁵⁵ In both of these states, operation of dispensaries is based on controversial interpretations of state law, as patient cooperatives or collectives in California and as “collective gardens” in Washington.⁵⁶ The Ninth Circuit explicitly rejected the argument that Section 542 means the Department must let states deal with medical marijuana suppliers who fail to “strictly comply” with state law.⁵⁷

However, with all that being said, if one *is* strictly complying with state law, neither the states nor the federal government can prosecute. Despite its limitations, *United States v. McIntosh* is ultimately a favorable ruling for the marijuana industry. Though a decidedly insufficient remedy for marijuana prohibition, this ruling “reduces the risk of federal raids for state-law abiding medical marijuana businesses in those states within the Ninth Circuit’s purview.”⁵⁸ This ruling also demonstrates that when state and federal powers clash, our highest courts will not simply “rubber stamp” federal action.

⁵⁵ *United States v. McIntosh*, 833 F.3d 1163, 1179 n.5 (9th Cir. 2016); Jacob Sullum, *9th Circuit Says Feds May Not Prosecute State-Legal Medical Marijuana Suppliers*, REASON.COM (Aug. 16, 2016, 6:30 AM), <http://reason.com/blog/2016/08/17/9th-circuit-says-feds-may-not-prosecute>.

⁵⁶ *United States v. McIntosh*, 833 F.3d 1163, 1179 n.5 (9th Cir. 2016); Shaun Martin, *U.S. v. McIntosh*, THE CALIFORNIA APPELLATE REPORT (Aug. 16, 2016, 10:46 AM), <http://calapp.blogspot.com/2016/08/us-v-mcintosh-9th-cir-aug16-2016.html>.

⁵⁷ *United States v. McIntosh*, 833 F.3d 1163, 1179 n.5 (9th Cir. 2016).

⁵⁸ *United States v. McIntosh*, 833 F.3d 1163, 1179 n.5 (9th Cir. 2016); Shaun Martin, *U.S. v. McIntosh*, THE CALIFORNIA APPELLATE REPORT (Aug. 16, 2016, 10:46 AM), <http://calapp.blogspot.com/2016/08/us-v-mcintosh-9th-cir-aug16-2016.html>.