Case No. S180365/S180468/S180560/S180749/S180803

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
EN BANC

IN RE ENFORCEMENT AGAINST DANA POINT SAFE HARBOR COLLECTIVE OF DANA POINT CITY COUNCIL SUBPOENA,

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CITY OF DANA POINT,
Petitioner,

v.

DANA POINT SAFE HARBOR COLLECTIVE,
THE POINT ALTERNATIVE CARE,
HOLISTIC HEALTH,
BEACH CITIES COLLECTIVE
DANA POINT BEACH COLLECTIVE,
Respondents.

REPLY BRIEF ON THE MERITS

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I. INTRODUCTION

This Court granted review of the procedural question of whether an order enforcing a legislative subpoena under Government Code section 37104 is reviewable by appeal. While this appeal is ongoing, this Court granted Respondents' request for a stay.

This Court should find that an order enforcing compliance with a legislative subpoena is appealable because: (1) such orders do qualify as "final judgments"; (2) these orders are subject to appeal under California Code of Civil Procedure 904.1(a)(1); and (3) strong public policy considerations weigh in favor of appealability of these orders.

II. RECENT PROCEDURAL HISTORY

The stay of the action of the Order of the Court of Appeal, G042893, has been all but ignored by Petitioner City of Dana Point as they attempt to access the very documents at issue on appeal through a disguised enforcement action in a separate trial court action.

After the California Supreme Court granted review, the Petitioner City of Dana Point filed actions for injunctive relief, nuisance, and damages against all of the medical marijuana collectives currently consolidated in the instant case. (*People of the State of California v. Beach Cities Collective*, Case No. 30-2010-00352103).

Respondents consider that the actions by the Petitioner City are an attempt to circumvent the stay granted by the Court of Appeals and the Supreme Court because the evidence that must be presented to resolve the allegations in the lawsuit necessarily includes the very documents whose disclosure is the ultimate subject of the subpoena under review and the ultimate issue in the instant appeal.

The fact that this second nuisance suit is an attempt to circumvent the rulings to be made by the California Supreme Court and the Court of Appeals could not be more apparent. Petitioner's counsel, Patrick Munoz is quoted in The Orange County Register on April 9, 2010, saying that, "*The civil suits do stem, in part, from the fight the dispensaries have put up in complying with the city's subpoenas....*" (Copy of the entire Article, which the Court is being asked to take a judicial notice of, is included herein as Exhibit "A").

III. ARGUMENT

A. While a Legislative Body Does Have Investigatory and Legislative Powers, the Subpoena Power, While Broad, is Not Unlimited. The Legislative Subpoena Must be Subject to Appellate Review to Protect Against Manifested Abuse That Infringes on Constitutional Guarantees

It is the function of the courts to determine whether the exercise of legislative power has exceeded constitutional limitations, as is the issue in the instant case. (*Lockard v. City of Los Angeles* (1940) 33 Cal.2d 453).

Unlike with other administrative orders, there is nothing contained within Section 37104 that addresses the proper procedure by which an appellate court is to review a trial court's order compelling compliance with a legislative subpoena.

This Court should find that an order enforcing compliance with a legislative subpoena is appealable because: (1) such orders do qualify as "final judgments"; (2) these orders are subject to appeal under California Code of Civil Procedure 904.1(a)(1); and (3) strong public policy considerations weigh in favor of appealability of these orders.

B. An Order under Section 31704 is Appealable Under California Code of Civil Procedure 904.1(a)(1)

Petitioner cites several cases for the presumption that the right to appeal is wholly statutory. Respondent does not take issue with this assertion, and reiterates that the right to appeal a final judgment such as an order enforcing a subpoena under Section 37104 has been indeed been expressly given by statute through California Code of Civil Procedure 904.1(a)(1).

1. California Code of Civil Procedure 904.1(a)(1) Expressly Authorizes the Appeal of an Order Enforcing a Section 37104 Subpoena

No language contained within Section 37104 expressly prescribes writ review of an order compelling compliance with a legislative subpoena. Further, "[t]he right to appeal should be recognized wherever it is not precluded by statute...." (*Redevelopment Agency of City of Berkley* (1978) 80 Cal.App.3d 158).

Because there is no statute expressly prescribing review by writ, the ordinary concerns that determine whether review should be by writ or appeal are pertinent. The plain language of Code of Civil Procedure §§ 904.1 et. seq. compels the conclusion that the order is appealable.

Code of Civil Procedure section 904.1, provides:

> a) An appeal, other than in a limited civil case, is to the court of appeal. An appeal, other than in a limited civil case, may be taken from any of the following:
>
> (1) From a judgment, except (A) an interlocutory judgment...

2. The Order in This Case is a Final Judgment and the City's Contrary View Must Be Rejected

City of Dana Point contends that orders made under Government Code section 37104 do not qualify as "final judgments" and are thus not appealable. Petitioner incorrectly argues that because Section 37104 is not one of the orders expressly listed in the general provisions, it is not

appealable. However, because an order under Section 37104 is a final determination of the parties' rights, it qualifies as a judgment as defined under Code of Civil Procedure section 577[1], and is thus appealable under § 904.1.

The question of the appealability of a Government Code § 37104 order was previously decided by the Court of Appeal in *City of Santa Cruz v. Patel* (2007) 155 Cal. App. 4th 134. The procedural posture of that case is nearly identical to the instant case. There, the City of Santa Cruz issued a legislative subpoena and when Patel failed to comply, the City instituted enforcement. Patel failed to comply with the subpoena. The Superior Court ordered Patel to comply and Patel appealed. The *Patel* court soundly reasoned:

> Before proceeding to the substance of the dispute we must decide whether the superior court's orders are appealable. We conclude that they are. Government Code section 37104 authorizes the legislative body of a city to issue subpoenas "requiring attendance of witnesses or production of books or other documents for evidence or testimony in any action or proceeding pending before it." In the event a witness refuses to comply with the subpoena, the mayor may report that fact to the judge of the superior court. (Gov. Code, § 37106.) "The judge shall issue an attachment directed to the sheriff of the county where the witness was required to appear, commanding him to attach the person, and forthwith bring him before the judge." (Id., §37107.) "On return of the attachment and production of the witness, the judge has jurisdiction." (Id., § 37108.) Refusal to comply with a subpoena could subject the witness to contempt proceedings. In that

[1] Code of Civil Procedure section 577 defines a judgment as "...the final determination of the rights of the parties in an action or proceeding."

> event, the witness has the same rights he or she would have in a civil trial "to purge himself [or herself] of the contempt." (Id., § 37109.)

This question was also extensively dealt with in *State of California ex rel. Department of Pesticide Regulation v. Pet Food Express Limited* (2008) 165 Cal.App.4th 841. While the Code section at issue in *Pet Food Express* was Government Code § 11180, the issues explored were identical to the instant case.

The Department of Pesticide Regulation argued to the Court that the order issued compelling Pet Food Express ("PFE") to comply with the administrative subpoena was nonappealable, and PFE's motion to appeal should be dismissed because it was not expressly made appealable by statute. The Court concluded that the order was in fact appealable by Code of Civil Procedure § 904.1, subdivision (a)(1). (*Id.* at 849).

The statutory scheme of the order in *Pet Food Express*, as well as in the instant case, provide for an original proceeding in the superior court, which results in an order directing the respondent to comply with an administrative subpoena. The Court in *Pet Food Express* reasoned:

> Whether the matter is properly characterized as an "action" (Code Civ. Proc., §22) or a "special proceeding" (Code Civ. Proc., §23), it is a final determination of the parties' rights. It is final because it leaves nothing for further judicial determination between the parties except the fact of compliance or noncompliance with its terms. (*Pet Food Express, supra,* 165 Cal.App.4th 841 at 851).

The *Pet Food Express* court applied the same reasoning as in *City of Santa Cruz v. Patel* (2007) 155 Cal.App.4th 234-- that analogous orders compelling compliance with legislative subpoenas must be deemed final judgments, appealable under Code of Civil Procedure § 904.1, subdivision (a)(1).

Like the Legislative subpoena in *Patel, supra*, 155 Cal.App.4th at 243 and in *Pet Food Express, supra,* 165 Cal.App.4th 841, the trial court order in this case concerning a legislative subpoena determined all of the parties' rights and liabilities at issue in the proceeding; the only determination left was the question of future compliance, which is present in every judgment.

The City of Dana Point argues this reasoning of the appellate courts is faulty, and asks this court to accept their own definition and interpretation of the "one final judgment rule".

Petitioner cites a general test to determine whether a particular degree is interlocutory or final, adopted by this Court in *Lyon v. Goss* (1942) 19 Cal.2d 659, 669-670, that states:

> [W]here no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the degree is interlocutory. (*Id.* at 669-70.)

Dana Pointe's reliance on *Lyon* is unavailing because *Lyon involves an unambiguously interlocutory judgment.*

In *Lyon*, a case involving a contractual dispute, an "Interlocutory Judgment and Decree" was entered, and a future hearing at the end of four months was scheduled. The court intentionally and expressly failed to adjudicate or define the rights of the parties, or what would constitute a substantial performance under the contract until the rehearing date. (*Id.* at 667). When an appeal was filed of the Interlocutory Judgment and Decree, and the court determined that the decree lacked finality because it called for further judicial action relating to issues pertaining to performance, rights and duties of the parties, and future contractual rights. (*Id.* at 671).

The express lack of finality in *Lyon* is simply not present in the instant case. The only issue left for future consideration is the fact of compliance or noncompliance with the order issued by the trial court, which is present in every case.

Petitioner bullet-points several factors extracted from *Morehart v. County of Santa Barbara* (1994) 7 Cal. 4th 725, in an attempt to show that orders enforcing legislative subpoenas are not enforceable as final judgments. *Morehart*, in which the trial court filed a judgment and statement of reasons as to three of plaintiff's five causes of action, is inapposite. This Court held that because the judgment appealed from

resolved fewer than all of plaintiffs' causes of action, it was erroneously treated as appealable by the Court of Appeal. The facts of the instant case are wholly distinguishable from the multi-causal *Morehart*, as there is only one cause of action, and therefore none of the points bulleted by Petitioner are useful for the analysis of the issue before this Court in this action.

Further, Dana Point's arguments seem disingenuous at best.

- Permitting appeal would not unnecessarily "clog the appellate court with a multiplicity of suits" because there is a possibility of future contempt proceedings as argued by Petitioner. The purpose of any judicial order which commands or prohibits specific conduct is to make the sanction of contempt available for disobedience. This fact does not render such an order 'non-final'. (*Pet Food Express, supra,* 165 Cal.App.4th 841 at 851). In *Morehart*, this was a decisive factor because three of the five causes of action were up for appeal, while two remained to be decided by the trial court. The instant case would not result in a multiplicity of suits, as there is only one cause of action. However, as noted in the procedural update, the City of Dana Point has instituted a flood of litigation in spite of the stay ordered by this Court against these same Respondents...and therefore the clogging court argument should be rejected out of hand.
- The appeal would not cause "uncertainty and delay in the trial court" because the whole of the action at the trial court level pertains to the

production of the documents. In *Morehart*, this was a decisive factor because three of the five causes of action still remained to be determined at the trial court level. Again, this test factor does not pertain to the instant case.

- A final judgment has been rendered in the instant case, and therefore, Petitioner's argument that an appeal may be "obviated" is puzzling, as that is why the instant case is before the court.
- The record in the instant case is complete, and full compliance with the legislative subpoena was ordered by the trial court. There is simply no further action by the trial court that could likely provide a "more complete record". Again, in *Morehart*, this was a decisive factor because three of the five causes of action still remained to be determined at the trial court level. This test factor does not pertain to the monocausal instant case.
- The instant matter has been completely adjudicated at the trial court level, there are no pending causes of action, and this *Morehart* factor is inapplicable.

Petitioner cites *Bishop v. Merging Capitol, Inc.,* where the Court of Appeal for the Second District, Division Five, held that because an order compelling compliance with an administrative subpoena (§ 11188) is not expressly made appealable by the Code of Civil Procedure and has no

adverse impact in and of itself, it is not final and not appealable. ((1996) 49 Cal.App.4th 1803, 1805.)

The reasoning of *Patel,* supra, 155 Cal.App.4th 234 is more persuasive. In *Patel*, the Sixth Appellate District expressly found that an order to compel compliance with a legislative subpoena pursuant to Government Code § 37104 is appealable as a final judgment. (*City of Santa Cruz v. Patel,* (6th Dist. 2007)155 Cal.App.4th 234, 240-43, 65 Cal.Rptr.3d 824.) The Sixth District rejected a contrary line of case, including *Bishop v. Merging Capital, Inc.*, from the Second District Court of Appeal, in favor of this "better view".

Patel reasoned,

> The fact that an intransigent witness may be subject to a contempt order does not mean that the order compelling compliance is not final. The normal rule is that 'injunctions and final judgments which form the basis for contempt sanctions are appealable....The purpose of any judicial order which commands or prohibits specific conduct is to make the sanction of contempt available for disobedience. As we have noted, this fact does not render such an order "nonfinal" and thus nonappealable. (*Agricultural Labor Relations Bd. V. Tex-Cal Land Management, Inc.,* (1987) 43 Cal.3d 696, 704). Indeed, the contempt judgment is not appealable. (*Code Civ. Proc.*, § 904 .1, subd.(a)(1)). It must be reviewed, if at all, by writ. (*Davidson v. Superior Court* (1999) 70 Cal.App.4th 514, 522). Therefore, review of the underlying order can reliably be had only if that order is appealable. (*Patel, supra*, 155 Cal.App.4th 234, 242, 243).

Patel then concluded that orders must be deemed final judgments and are, therefore, appealable pursuant to Code of Civil Procedure § 904 .1, subd.(a)(1).

State ex rel. Dept. of Pesticide Regulation, supra, was cited and followed in the more recent case of *The People ex rel. Preston DuFauchard v. U.S. Financial Management,* (2009) 169 Cal.App.4th 1502:

> We agree with the court's analysis in *State ex rel. Dept. of Pesticide Regulation*. In this case, the trial court's order compelling compliance with the Commissioner's administrative subpoena constituted a final determination of the parties' rights, notwithstanding the possibility that further proceedings might be required to gain U.S. Financial Management's compliance with that order. (See *State ex rel. Dept. of Pesticide Regulation, supra*, 165 Cal.App.4th at p. 852.) As such, the order constitutes an appealable final judgment pursuant to Code of Civil Procedure § 904.1, subdivision (a)(1). (See *State ex rel. Dept. of Pesticide Regulation, supra*, 165 Cal.App.4th at p. 849.)."

C. Strong Public Policy Considerations Favor the Appealability of an Order Enforcing a Subpoena Issued Pursuant to Section 37104

An appellate writ review of a compliance order is *not* a sufficient substitution for an appeal. Unlike an appeal, a writ may be summarily denied without a written opinion. (Cal. Const., art. VI, § 14 [appellate court decisions that determine causes shall be in writing with reasons stated]; *People v. Kelly* (2006) 40 Cal.4th 106, 116, fn.1 [summary denial of writ petition does not determine a cause for purposes of written opinion requirement].) A written opinion is extremely valuable to a party challenging an administrative subpoena.

Petitioner's remaining argument is shockingly self-serving. Petitioner argues that any potential investigation may be "endlessly delayed" because of the electoral process of the city council. Petitioner worries that "there is a very good possibility that by the time all of the appeals, writs, and petitions are resolved, the makeup [of] a city council may have changed such that there is a new majority on the council who may not be interested in pursuing the investigation."

The fact that Petitioner is worried that the will of the people who elect the city council members may take precedence over personal preferences or vendettas of individual city council members is appalling. This is another clear policy reason behind Respondent's argument that these subpoenas must be subject to appellate review to ensure they are properly within the scope of the legislative power.

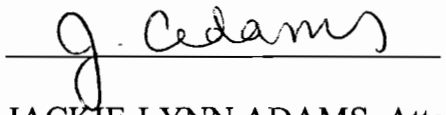
Respondent concedes that the legislative subpoena power is broad, but that does not render it unlimited. The legislative subpoena must be subject to appellate review to protect against manifested abuse that infringes on constitutional guarantees.

Since this case presents issues of critical importance such as cities' attempts to deal with increasingly complex zoning and land use issues; as well as the conflict between state and federal law on medical marijuana, the

public interest--as well as that of the litigants-- would be best served by the kind of full review and opinion provided by appeal.

DATED:

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.204

The foregoing brief is proportionately spaced, using 13-point Times New Roman. The Word count of 3,017 is based on information provided by Microsoft Word processing program and therefore does not exceed the limits provided by Rule 8.204, California Rules of Court.

I certify that the foregoing is true and correct.

Executed this 23 day of July, 2010, at Los Angeles, California.

J. Adams

Jackie-Lynn Adams
State Bar No. 266807

EXHIBIT "A"

THE ORANGE COUNTY BETA
REGISTER

Dana Point sues to shut down pot shops

BY VIK JOLLY
2010-04-09 13:56:02

DANA POINT — The city has sued six medical marijuana dispensaries in town to shut them down saying they're operating illegally because the establishments are not permitted under the city's municipal code.

Since the suits were filed last month the city believes that two of the dispensaries have shut down and the city has not yet made a decision on how to handle the suits against them.

The civil suits filed in Orange County Superior Court come about nine months after the city served five medical marijuana dispensaries subpoenas to turn over their records after an organization asked the city to change its zoning laws to officially allow for the cooperatives.

Dispensaries refused to comply and the city went to court to enforce its subpoenas.

The city does not have a specific ordinance prohibiting medical marijuana dispensaries. But that does not mean the operations are permitted, like many other uses not specifically addressed in municipal codes, City Attorney Patrick Muñoz said.

The city sought the records to determine if it should consider changing its zoning to allow such uses, he said.

The five dispensaries have put up a fight over the records with a separate legal question on the subpoenas ending up before the California Supreme Court.

The city is now seeking a preliminary injunction in county Superior Court to close the establishments, pending a trial.

Saying that the civil suits do stem, in part, from the fight the dispensaries have put up in complying with the city's subpoenas, Muñoz said the city has always maintained the operations are illegal.

"We've never made any secret of the fact that they're operating illegally under our zoning," Muñoz said. "At this point we would be naïve to think that these particular operations are acting lawfully because they are going to such great extents to hide their records."

Attorneys for the dispensaries disagreed saying the establishments are operating legally under California law.

"My feeling is that this injunction (the city is seeking) is in retaliation for resisting the subpoena," said attorney Alison Adams, who represents Holistic Health in Dana Point.

Trying to shut down the collectives "flies in the face of" what the city has said in the past, said attorney Lee Petros for the Point Alternative Care Dispensary.

"They've talked about somebody coming to them and looking at a possible zoning modification," he said.

Muñoz said that the city started the process "with a very open mind and investigating whether or not they should permit this use, and if they should, whether or not there is a way they could regulate it so (the dispensaries) were operating in a lawful manner."

The City Council has not called off that investigation and is still willing to consider the zoning issue once the city has all the information it needs to make a decision, he said.

But "the fact that (the dispensaries) haven't given us any records and are fighting us tooth and nail is certainly going to have an impact on the staff's recommendation (on whether to allow such establishments) when the time comes," Muñoz said.

"In the meantime, since the uses are currently illegal, the city came to the conclusion that it couldn't turn a blind eye to the ongoing illegal activity. So we're taking action to shut them down until we complete our investigation," he said.

The civil suits filed argue that the city needs to act to abate public nuisances because the dispensaries are in violation of the city's zoning ordinance and in violation of both federal and state law by illegally selling marijuana.

The city further alleges that the establishments have also violated the state's Business and Professions Code through their actions which constitute unfair and unlawful business activity under the Unfair Competition Law.

The city has no commitment to complete its investigation, Muñoz said.

"While we remain willing, it strikes us in light of their conduct that when the investigation is complete we will have determined that they're nothing more than illegal drug operations selling controlled substances to young people who are primarily under the age of 21, including high school children, and making no effort whatsoever to distribute 'medicine' to qualified patients," he said.

Contact the writer: 949-465-5424 or vjolly@ocregister.com

PROOF OF SERVICE
(CCP §§ 1013(a) and 2015.5)

State of California,)
)ss.
County of Los Angeles.)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1055 Wilshire Boulevard, Suite 1996, Los Angeles, California 90017.

This brief has been submitted to this court and to the court of appeal by priority mail pursuant to rule of court rule 8.25(b)(3)(A).
On July 26, 2010, I served the foregoing REPLY BRIEF ON THE MERITS by placing a true copy thereof enclosed in a sealed envelope, as follows:

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☒ **(BY MAIL)** - I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States mail in Los Angeles, California.

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☒ **(STATE)** - I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **7.26.2010** at Los Angeles, California

J. Adams
Jackie Adams