IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

City of Riverside, Plaintiff and Respondent, v. INLAND EMPIRE PATIENTS HEALTH and WELLNESS CENTER Inc.; William J. Sump II; Lanny D. Swerdlow; et al. Defendants /Appellants.	**Case No. S198638**

APPEAL FROM ORDER GRANTING PRELIMINARY INJUNCTION

Honorable John D. Molloy, Judge
Superior Court Riverside County

APPELLANTS' OPENING BRIEF ON THE MERITS

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INTRODUCTION

Inland Empire Patient's Health and Wellness Center ("IEPHWC"), J. William Sump II, Lanny D. Swerdlow and Angel West Inc. appealed the trial court's order granting a Preliminary Injunction issued on November 24, 2010. The injunction was based on the application of Respondent's municipal ordinance which bans all medical marijuana patient associations (a.k.a.: "collectives", "dispensaries", "cooperatives" and "cultivation projects") formed pursuant to the *Medical Marijuana Program* (See, *Health and Safety Code*[1] *§11362.775*) from operating anywhere in the City of Riverside.

The preliminary injunction enjoins IEPHWC operations, finding their activities a nuisance per se. The preliminary injunction also prohibits appellants from engaging in activities authorized by said Health and Safety Code section, including providing authorized medical marijuana to IEPHWC's members pursuant to the *Medical Marijuana Program (section 11362.7 et seq.) ("MMP").*

The ordinance at hand violates a consistent rule applied by this court; i.e., municipalities can't ban what state law permits. The legislature's express purpose behind the creation of the *MMP* was to "enhance the access" through these very institutions (i.e.,"collectives") and assure "uniform" application of the *Medical Marijuana Program* throughout the counties of the State of California. (See, Legislature's preamble to *MMP*)

The consequence of Respondent's interpretation would be an absurd result not intended by the legislature and in direct conflict with its express purpose; the elimination of these institutions, city by city, until few are left or are concentrated in small pockets of the state-the exact opposite of what the legislature's goals were in enacting the *MMP*.

"If the preemption doctrine means anything, it means that a local entity may not pass an ordinance, the effect of which is to completely frustrate a broad, evolutional statutory regime enacted by the Legislature." (emphasis added) *Fiscal v. City & Co. of San Francisco (2008) 158 Cal.App.4th 895, 911.*

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[1] All further statutory references are to the Health and Safety Code unless otherwise stated.

PROCEDURAL BACKGROUND

On November 24, 2010 the trial court issued a preliminary injunction prohibiting appellants' activities undertaken pursuant to *§11362.775*. (Clerk's Transcript, "CT" 445) The trial court ruled that due to the existing federal ban on marijuana that respondent's ordinance was lawful and not preempted by the *Medical Marijuana Program* (*MMP*) and its prohibitions on local ordinances which are not "consistent" with the *MMP*. (Reporter's Transcript, hereinafter "RT" 22-24) *(See, section 11362.83)*. The trial court additionally relied on *City of Claremont v. Kruse (2009) 177 Cal.App.4th 1153* as grounds for permitting a municipality to **permanently** ban otherwise state sanctioned and encouraged conduct under the *MMP*. (RT 10)

On December 20, 2010 the Court of Appeal issued a stay of the trial court's preliminary injunction and on March 2, 2011 it granted a Writ of Supersedeas staying the preliminary injunction.

STEMENT OF APPEALABILITY

This is an appealable order granting a preliminary injunction. *Code of Civil Procedure § 904.1(a)(6)*. The notice of appeal was filed timely. (CT 446)

FACTS

IEPHWC is a not for profit California Mutual Benefit Corporation established for the sole purpose of forming an association of qualified individuals who collectively cultivate medical marijuana and redistribute to each other; it has been in operation at the same location since December 2009. Its principal board members, Mr. Joseph William Sump II and Mr. Lanny D. Swerdlow are also appellants here.

IEPHWC is located in a commercial zone within the City of Riverside (647 Main Street, Suite 2-A); this zone generally permits medical uses and has alternatively been described by Respondent as a "Business and Manufacturing Park Zone District". (CT p.278, 273, 52, 4). IEPHWC selected this location as it is more than 1000 feet from any school or church. IEPHWC strictly adheres to multiple policies which are implemented to ensure compliance with all state law and local sheriff policies on the subject, including

adhering to the State Attorney General's Guidelines for The Security and Non Diversion of Medical Marijuana. (CT p.279, 277-281, 299, 302, 304, 306, 452)

Community activities IEPHWC participate in have been recognized by local officials in the community. (CT 275)

IEPHWC has also created a "farmer's market" approach as a means of providing medical marijuana at the lowest price possible. (CT 275)

IEPHWC maintains a strict policy of not disturbing neighbors or interfering in any manner with the operation and functions of any surrounding businesses; nor have they ever been known to maintain a nuisance. (CT 279) Prior to opening, IEPHWC officials consulted with the local city council. (CT 278) On January 5, 2009 the city responded that it had "create[d] a definition of medical marijuana dispensaries and prohibits this use anywhere in the City". (CT 59-60)

On May 20, 2010 respondent filed a complaint for injunctive relief "TO ABATE A NUISANCE". The complaint specifically relied on *Civil Code §§3479, 3480, 3491, 3494* and *City of Riverside Municipal Code §§1.01.110, 6.15.020, 19.150.020* and *19.070.020.* (CT 1). Respondent alleged a theory of nuisance per se. (CT 4, paragraph 20, 27 of Verified Complaint; CT 150, 154, Motion for Preliminary injunction).[2] Angel City West is the property management company for the building IEPHWC occupies. (CT 2)

Respondent was attempting to enforce *Riverside Municipal Code §19.150.020* which listed all permissible land uses, "strictly prohibited" any use which was "prohibited by ...federal law" and declared that uses not listed "in Tables are prohibited" and that the city's table of uses also identified uses "specifically prohibited". (CT 149, 201) The city's table of permissible uses expressly listed "medical marijuana dispensary" as a "Prohibited Use" in every part of the city. (CT 207)

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[2] The complaint was amended on June 10, 2010 to add "William Joseph Sump II" (CT 71) and on August 19, 2010 to correctly name "Does 2" as "Inland Empire Health and Wellness Center, Inc.". (CT 138)

On August 30, 2010 respondent filed a motion for preliminary injunction. (CT 143) Respondent maintained that despite California law on the subject, the city expressly forbids any activities which are illegal under federal law and thus appellants are a nuisance per se. (CT 149-150) The motion was supported by the declaration of Darren Woolley, of the City of Riverside Police Department. (CT 158, 159). Woolley's declaration sought to establish there was a connection between the clinic Swerdlow is a nurse at and IEPHWC; he attempted to do so by indicating they were in the immediate vicinity of each other and IEPHWC was one of the many collectives he was referred to at the clinic. (CT 159)

No evidence, at all, was submitted by respondent (in support of their motion for a preliminary injunction) or is in this record that in any manner tied Angel City West Inc. to any of the activities of IEPHWC, Swerdlow or Sump.

On October 1, 2010 appellants IEPHWC, Sump, Swerdlow and Angel City West filed an opposition to the motion for preliminary injunction. (CT 250) Woolley's declaration was contradicted in material parts by both Swerdlow's declaration (CT 273) and Sump's declaration (CT 277) in support of the opposition to the motion for preliminary injunction. Their respective declarations (especially that of Sump) set out in great detail the operating procedures of IEPHWC, attached relevant documents as exhibits and provided details about the interactions with Woolley. (CT 273-275, 277-342).

Appellant's argued that the city's ban on medical marijuana patient associations formed pursuant to *section 11362.775* was preempted by the *MMP* (CT 257), unlawful under *section 11362.83* (CT 254-255) as a local ordinance not "consistent" with the MMP, and that their federal law dichotomy justification violated the holding in *Qualified Patients Association v. City of Anaheim (2010) 187 Cal.App.4th 734* as well as the *California Constitution's Article III, §3.5.* (CT 266-267)

On October 18, 2010 respondent filed a reply to appellant's opposition; therein respondent elected to remain completely silent with respect to appellant's argument that the city's federal law dichotomy justification for their total ban on collectives was

unlawful. Instead the city only responded to appellant's arguments regarding state law preemption. (CT 343) Respondent even acknowledged at the hearing on the motion that this court's opinion in *Qualified Patients Association v. City of Anaheim* was "limited...to federal preemption" and exclusively prohibited the federal dichotomy justification as a means for a municipality to ban the conduct. (RT 11) Respondent nevertheless maintained that they were compelled *under Government Code section 37100* to not permit any conduct unlawful under federal law. (RT 22) The city never offered evidence of criminal acts and neighborhood deterioration which was specific to any one appellant.

On November 24, 2010 the trial court heard arguments from both sides and ruled the preliminary injunction would issue. (RT 22-24) The trial court's written order prohibited appellants from "conducting **any** activities or operations related to the distribution of marijuana". (CT 445) The injunction additionally prohibited Angel City West Inc. from "renting" the property "for such activities". (CT 445)

HISTORICAL PERSPECTIVE

California, first through a voter proposition in 1996 (*Compassionate Use Act*) and in 2003 through state legislation (*MMP*), decided to part ways with the federal government's intolerance with marijuana use for medical treatment.

The Legislature's principle purpose was; to 1) "Promote uniform and consistent application of the act among the counties within the state" and 2) "Enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." (2003 Cal SB 420 § 1; 2003 Cal ALS 875; See, Legislature's preamble to the *MMP*).

The Legislature's express purpose behind the creation of the *MMP*, as shall be discussed in greater detail *infra*, are central to appellant's arguments before this court.

California's parting with their federal counterpart was the culmination of years of federal litigation in an attempt to reclassify marijuana from a Schedule I drug to a Schedule II (thus, allowing the prescribing of the substance by medical doctors); this federal litigation to reclassify marijuana was conducted before the administrative court of the Department of Justice and included receipt of substantial evidence on the subject. At

the conclusion the administrative judge issued a 68 page opinion on the issue finding that the overwhelming evidence supports marijuana's medical efficacy, stating:

> "The Judge realizes that strong emotions are aroused on both sides of any discussion concerning the use of marijuana. Nonetheless it is essential for this Agency, and its Administrator, calmly and dispassionately to review the evidence of record, correctly apply the law, and act accordingly....
>
> The evidence in this record clearly shows that marijuana has been accepted as capable of relieving the distress of great numbers of very ill people, and doing so with safety under medical supervision. It would be unreasonable, arbitrary and capricious for DEA to continue to stand between those sufferers and the benefits of this substance in light of the evidence in this record."
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> *See, In The Matter Of MARIJUANA RESCHEDULING PETITION* (1988, UNITED STATES DEPARTMENT OF JUSTICE Drug Enforcement Administration Administrative Court, Docket No. 86-22)

In 1989 the Administrator of the federal Drug Enforcement Administration (DEA), rejected the Administrative Law Judge's decision. See, *54 FR 53767* and eventually led to California's break with the federal government in 1996 with passage of "*The Compassionate Use Act*".

As stated by Judge Kozinski in his concurring opinion in *Conant v. Walters (9th Cir. 2002) 309 F.3d 629*;

> "Those immediately and directly affected by the federal government's policy are the patients, who will be denied information crucial to their well-being, and the State of California, whose policy of exempting certain patients from the sweep of its drug laws will be thwarted. In my view, it is the vindication of these latter interests--those of the patients and of the state--that primarily justifies the district court's highly unusual exercise of discretion in enjoining the federal defendants from even investigating possible violations of the federal criminal laws."
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> *Conant v. Walters*, supra., 309 F.3d at 640.

California has put in place through the *MMP* an entire statutory scheme covering dozens of related issues to assure that its policy decisions are carried out. (See, *Section 11362.775*). Respondent's ordinance denies individuals the ability to obtain state sanctioned medication through the means authorized by *§11362.775*; thus, raising an imaginary blockade around respondent's city thwarting the State's policy.

I.
WHEN A CHALLENGE IS PRESENTED TO THE VALIDITY OF AN ORDINANCE RELIED UPON TO OBTAIN PRELIMINARY INJUNCTION A FINDING THE ORDINANCE IS UNLAWFUL REQUIRES REVERSAL OF THE PRELIMINARY INJUNCTION.

"[w]here the 'likelihood of prevailing on the merits' factor depends upon a question of law ... the standard of review is not abuse of discretion but whether the superior court correctly interpreted and applied [the] law,...." *Efstratis v. First Northern Bank (1997) 59 Cal.App.4th 667, 671–672*; An injunction based on an unconstitutional ordinance exceeds the issuing court's jurisdiction. *Welton v. Los Angeles (1976) 18 Cal. 3d 497, 507*

Respondent's ordinance prohibits "medical marijuana dispensaries" (respondent's label) from operating within the city. (*See, Riverside Municipal Code § 19.150.020(A)* (permitted uses) and *§19.910.140* (defining "medical marijuana dispensary"). The term "association" or "collectives" comports with the words in *§11362.775*.

Respondent maintains that in creating the *MMP* the Legislature did not expressly prohibit cities from totally banning said institutions under the cities traditional "police power". Under that theory, respondent maintains, medical marijuana collectives may be completely and permanently excluded from existence within the city.

Respondent's total ban on medical marijuana collectives violates *Cal. Const., art. XI, §7* as it is "*in conflict with general laws*" and violates *§11362.83* requirement that local ordinances be "consistent" with the *MMP*. "[B]y enacting an outright, unconditional ban on the administration of [medical marijuana] within its borders", *N. Cal. Psychiatric Society v. City of Berkeley (1986) 178 Cal.App.3d 90, at 103-104* [striking down municipal ban on medical treatment authorized by state law], respondent "has created an apparent conflict with the state legislative statutory scheme and its guarantee to all..." (*Id. at 103-104*) of "uniform application of the law", of "enhanced access" to medical cannabis, of the right to "associate" in order to obtain medical cannabis and the ability to form collectives as encouraged by the Legislature in the statutes of the *MMP* and the preamble containing the

Legislature's express purpose. (see, Legislature's preamble to *MMP*, *Stats 2003 ch 875*; *section 11362.775*.)

"A county or 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*, italics original.) "Local legislation in conflict with general law is void." *Morehart v. County of Santa Barbara (1994) 7 Cal.4th 725, 747.* "The evident intention of the clause above quoted was to prevent any confusion, or discord, or incongruity between the general legislation of the state in its broad sovereign capacity and the special legislation of its dependent municipalities." *Ex parte Cambell (1887) 74 Cal. 20, 27 (*Justice Thomas B. McFarland, dissenting) The interpretation pressed by respondent would prohibit the state legislature from implementing unpopular policies it seeks to uniformly apply throughout the state leading to municipal anarchy.

The definition of "*conflict*" within *Cal. Const., art. XI, § 7* necessarily includes a broad concept that may not seem like "conflict" in the dictionary sense. "The invalidity arises not from a conflict of language but from the inevitable conflict of jurisdiction which would result from dual regulations covering the same ground. Only by such a broad definition of "conflict" is it possible to confine local legislation to its proper field of supplementary regulation." *People v. Villarino, (1955) 134 Cal. App. 2d Supp. 893, 897*

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II.
LOCAL ORDINANCES & ENFORCEMENT PROCEDURES WHICH CONFLICT WITH STATE LAW ARE UNCONSTITUTIONAL AND VOID AS PREEMPTED.

A. THE MEDICAL MARIJUANA PROGRAM ACT PERMITS THE DISPENSATION OF MARIJUANA BY ASSOCIATIONS AND COLLECTIVES FOR MEDICAL PURPOSES TO QUALIFIED PATIENTS AND EXEMPTS THEM FROM LOCAL NUISANCE ABATEMENT ORDINANCES.

It is customary for proponents of this ban to refer to decisions which interpreted the more narrower voter enacted proposition (*Compassionate Use Act, "CUA"*). Those decisions should be confined to historical perspective and when employed that distinction noted as the law evolved thereafter; this is due to the "dramatic change in the law" *(People v. Urziceanu, (2004) 132 Cal.App.4th 747, 785)* which the passage of the *MMP* brought about when compared to the narrow rights under the *CUA*. Much of the language cited by respondent regarding the "narrow nature of the law" rely on cases merely interpreting the *CUA*. Thus, respondent's continued attempt to label the *MMP* as a "narrow" criminal defense and nothing more is simply not correct-it is a broad statutory scheme covering dozens of related topics and seeking to implement its purpose.

The Legislature declared their **intent** in enacting the *MMP* was to:

> "(b)(2) **Promote uniform and consistent application of the act among the counties within the state.**
> (3) **Enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects."**

(2003 Cal SB 420 § 1; 2003 Cal ALS 875.)

The *MMP* contains *§ 11362.775*, which states,

> "Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order to collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, **or 11570**." (emphasis added)

The court of appeal in *People v. Urziceanu (2004) 132 Cal.App.4th 747, 785*, articulated that it was the intent of the Legislature in enacting *§11362.775* to exempt qualified patients and primary caregivers from specific Health and Safety Code violations listed therein which previously prevented the lawful dispensation of medical cannabis "and **the laws declaring the use of property for these purposes a nuisance."** (*Urziceanu supra*, at *785*) (emphasis added).) *Urziceanu* pointed out that the enactment of the *MMP* signified a "dramatic change in the law" (*Urziceanu, supra, at 785*) in that the *CUA* did not permit distribution and now at the request of the voters (see, §11362.5 subd. (b)(1)(C)) the Legislature created a distribution system. (*See, People v. Urziceanu (2004) 132 Cal.App.4th 747, 785.)*

> "The Legislature extended certain protections to individuals. Those protections included immunity from prosecution for a number of marijuana-related offenses that had not been specified in the CUA, among them...11570 [abatement of nuisance created by premises used for manufacture, storage or distribution of controlled substance]." (citations omitted) By authorizing a CUA defense to these other marijuana-related offenses, the Legislature furthered its goal of "address[ing] additional issues that were not included within the act, and that must be resolved in order to promote the fair and orderly implementation of the act." (Stats. 2003, ch. 875, § 1.)..."

People v. Wright (2006) 40 Cal. 4th 81, 93.

The same immunity from nuisance per se causes of action under *section 11570* also appears in *section 11362.775*.

The *Urziceanu* court was keen in referring to the Legislature's express enumeration of *§11570* within *§ 11362.775* and realized the obvious, i.e. that additionally municipalities were prohibited from using "the laws declaring the use of property for these purposes a nuisance." *People v. Urziceanu* supra, at *785*.

While *§ 11362.775* refers to "state criminal sanction" this possible legislative scrivener's error[3] can't vitiate the exclusive civil nuisance aspects of *§11570;* this section

[3] It is not a scriveners error in that *§11570* is the last section enumerated and it is placed after the "," and the term "or" which singularly appears at this location of §11362.775; thus, indicating the legislature's knowledge that *§11570* was civil in nature and electing to separate it with the coma

declares that every location which is used to sell controlled substances "is a nuisance, which shall be enjoined...and for which damages may be recovered". (*§11570)*

§11570 is strictly a civil nuisance cause of action which the legislature unequivocally excluded from the reach of local officials in that the section *(§11570)* directly ties into others which give municipalities the ability to declare "drug houses" a nuisance (See, *§§ 11571 §11571*.1 and §11571.5).

The legislature's exclusion of *§11570* as a civil cause of action when it created *§11362.775* indicated the removal of local governments ability to label the conduct therein authorized a nuisance and ban it from its borders.

The decision in *Qualified Patients Association v. City of Anaheim (2010) 187 Cal.App.4th 734, 753-754* (referred to as "QPA") recognized as much when it noted the reason for the legislature's change in the law was to permit the establishment of these institutions free from civil nuisance repercussions.

> "The court in *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1390, held that the "'general availability of injunctive relief under *section 11570* against buildings and drug houses used to sell controlled substances is not affected by'" *the CUA*. The Legislature subsequently enacted the MMPA. *Sections 11362.765* and *11362.775* of the MMPA immunize operators of medical marijuana dispensaries—provided they are qualified patients, possess valid medical marijuana identification cards, or are primary caregivers—from prosecution under state nuisance abatement law (§ 11570)."
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> *QPA supra, 753-754.*

QPA also recognized that;

> "it seems odd the Legislature would disagree with federal policymakers about including medical marijuana in penal and drug house abatement legislation (citations), but intend that local legislators could side with their federal—instead of state—counterparts in prohibiting...property uses "solely on the basis" of medical marijuana activities. *(§§ 11362.765 & 11362.775.)* After all, local entities are creatures of the state, not the federal, government." *QPA supra, 754.*

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and the term "or" to signal that obvious conclusion. "[I]t has long been the rule in California that the literal language of enactments may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers." *Bell v. D.M.V. (1993) 11 Cal. App. 4th 304, 311* (holding that a statute which applied expressly only to "prosecutions" also applied to civil administrative hearings as intended by the legislature.)

The provisions of the *MMP* were interpreted in *People v. Hochanadel (2009) 176 Cal. App. 4th 997, 1011* wherein the court rejected the People's argument that "storefront" collectives were not lawful and held that "a properly organized and operated collective or cooperative that dispenses medical marijuana through a storefront may be lawful under California law,...". *Hochanadel* also pointed out that the Attorney General, under the direction of the California Legislature (see, *§11362.81(d)*), reached the conclusion that the law permits for storefront type of collective as operated by IEPHWC. "Nothing in *section 11362.775*, or any other law, prohibits cooperatives and collectives from maintaining places of business." *People v. Hochanadel supra, 176 Cal. App. 4th at 1018.*

Having made the conduct lawful and having expressly removed the ability for municipalities to enact nuisance cause of actions, the bar to a nuisance causes of action under *Civil Code §3482* came into full effect. That section expressly bars this type of cause of action and or ordinance. "Nothing which is done under the express authority of a statute can be deemed a nuisance." *Civil Code §3482.* Even under the "consistently applied [] narrow construction to Civil Code section 3482" its protection must be carried out in this case. *Jacobs Farm/Del Cabo, Inc. v. Western Farm Service, Inc., (2010) 190 Cal. App. 4th 1502, 1530.* "In general, the cases that apply the protection do so where the alleged nuisance is exactly what was lawfully authorized." *Id at 1532.*

The nuisance cause of action here is based on nothing more than lawful conduct and pursuant to *Civil Code §3482* is thus barred and so is respondent's ordinance. Enforcement here is accomplished with abatement lawsuits seeking attorney's fees and injunctions prohibiting conduct authorized by state law. These actions are carried out by respondent "solely on the basis of th[e] fact" *(§11362.775)* IEPHWC is doing what the *MMP* permits. This is precisely what the reference to *§11570* as an excluded civil cause of action for this conduct was meant to prevent. (See, *§11362.775)*

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B. MUNICIPALITIES MAY ONLY ENACT REGULATORY ORDINANCES "CONSISTENT" WITH THE *MMP*. THEIR AUTHORITY IS LIMITED UNDER *SECTIONS 11362.83* AND *11362.768* TO "REGULAT[ING]"AND HAS NEVER BEEN EXTENDED TO PERMIT MUNICIPALITIES TO PROHIBIT CONDUCT PERMITTED BY THE *MMP*.

The express limitations placed by state statutes on the enactment of local legislation can be determinative of the extent of local authority to enact local legislation in that same field. See, *People ex rel. Deukmejian v. County of Mendocino, (1984) 36 Cal. 3d 476, 486-487.* Thus, "*each phrase* within an express preemption provision limits the universe of local action pre-empted by the statute." *Big Creek Lumber Co. v. County of Santa Cruz (2006) 38 Cal. 4th 1139,* 1156.

The legislature provided municipalities limited and restricted authorization to pass ordinances that are "consistent" with the *MMP* and "ordinances that regulate the location, operation, or establishment of a medical marijuana cooperative or collective" (*See, § 11362.83*)

An ordinance enacting a total ban on conduct otherwise encouraged by state law is not a "regulation of the location, operation or establishment"; instead it's a prohibition on the activity-actions stretching beyond the plain meaning of the words in *§ 11362.83*. To "regulate" means "[t]o fix, establish, or control; to adjust by rule, method, or established mode; to direct by rule or restriction; to subject to governing principles or laws." (Black's Law Dict. (6th ed. 1990) p. 1286, col. 1.) A total ban of conduct does not comport with this plain definition except on the most creative stretch of the meaning of the word; "regulate" infers the very existence of other laws which permit the conduct to occur.

The term "regulate" versus "prohibit" has always been understood this way. Noting the difference between "regulate" and "prohibit" an appellate court stated: "The ordinance does not absolutely forbid the maintenance of a corral in the business district, but provides that no corral of the kind interdicted by it shall be maintained in the business section without a permit from the city trustees." *Boyd v. Sierra Madre, (1919) 41 Cal. App. 520, 524-525.* And in *Young v. Dept. of Fish and Game (1981) 124 Cal.App.3d* 257 the court held that a regulation is not a ban so long as there is a regulated alternative

manner to participate in the conduct. "Further, the evidence introduced and the wording of the regulations themselves...show that a complete commercial ban was not adopted by the Commission. The regulations only prohibited *one* portion of commercial collecting activity." *Id at 277-278.* This is not the case here. Respondent has enacted an absolute ban. The legislature however expressly limited the local authority to "regulate" only "location" and "establishment". (See, *sections 11362.83* and *11362.768*)

"The word '"regulate,"'..., has always been deemed to mean '"to fix"' or '"to establish,"' and no other signification may now properly be attached to that word in the connection in which it is so employed..." *Arnold v. Sullenger (1927) 200 Cal. 632, 635-636*

Other decisions have understood there is a difference between "regulate" and "prohibit"; when a statute permits one to "regulate" it does not permit one to "prohibit". A statute that permitted "regulation" was not "prohibiting" because the ordinance "did not eliminate the existence of the act to be regulated" as it "does not prohibit all signs". *Outdoor Systems v. City of Mesa (1991, Sup.Crt AZ) 819 P.2d 44, 48.* In *Yaworski v. Town of Canterbury (1959 Conn. Supreme Crt) 154 A.2d 758, 760* the court struck down a total prohibition on garbage disposal sites because the legislature had, like here under the *MMP*, only granted the authority to "regulate". In *Edinburg Township v. Novelty Inc. (1992, OH App Crt) 1992 Ohio App.LEXIS 3731* the court struck down a total prohibition on sale of fireworks on account the state legislature, as in this case, only granted municipalities the authority to "regulate". In *Blue Sky Bar v. Town of Stratford (1986 Conn. Supreme Crt) 523 A.2d 467, 471* the court held that

> "It is fair to say that the power to regulate, however, does not necessarily imply the power to prohibit absolutely any business or trade, as the very essence of regulation, which infers limitations, is the continued existence of that which is regulated. Prohibition of an incident to or particular method of carrying on a business is not prohibition, but rather it is merely '"regulation"...We conclude that the ordinance at issue in this case is regulatory. The ordinance merely proscribes vending from motor vehicles; it does not preclude all vending." (emphasis added) *Id at 471*

The following courts have eloquently articulated this same theme; i.e. a legislature's grant of the authority to local governments to "regulate" does not include authority to prohibit the conduct to be regulated. *State v. Colloway (1906 Id Supreme Crt) 84 P. 27, 32-33; State ex rel Daniels v. Kasten (1964 MO App Crt)385 S.W. 2d 714, 717; Dart v. City of Gulfport (1937 MISS Supreme Crt) 113 So. 441, 444; State ex rel. Abattoirs v. Steinbach (1955 MO App Crt) 274 S.W. 2d 588, 590-591; Oliver v. Oklahoma Alcohol Bureau of Control (1961 OK Supreme Crt) 359 P.2d 183, 186-187; Gordon v. Indianapolis (1932 Indiana Supreme Crt) 183 N.E. 124, 125; Steadman v. Kelly (1948, Alabama Supreme Crt) 250 Ala. 246, 249; People ex rel Goldberg v. Busse (1909 Ill Supreme Crt) 88 N.E. 831, 832-833; State ex rel. Nowothy v. Milwaukee (1909 WI Supreme Crt) 121 N.W. 658, 659-660; In re Hauck (1888, Michigan Supreme Crt) 38 N.W. 269, 274-275.* .

In *People v. Kaufman Carpets (1969) 298 N.Y.S.2d* 241 the court relying on the "*Corpus Juris Secundum* (*vol. 62, Municipal Corporations, § 161*)" stated: "'the power to regulate necessarily implies the power to permit conditionally the doing of a thing, power to regulate ordinarily does not include power to prohibit or suppress. Prohibition is not the equivalent of regulation; and ordinances of prohibition, direct or indirect, enacted under the power of regulation only are generally unwarranted."

> "Several cases contain illustrations of the recognition of a difference between regulation and prohibition...There is a wide difference between regulation and prohibition."

People v. Kaufman Carpets supra, 298 N.Y.S.2d at 243.

No authority exists for the proposition that a legislative grant of power to "regulate" specified areas such as "location" and "establishment" is synonymous with the power to "prohibit" the conduct. "...the Legislature knew how to create an exception if it wished to do so; nothing would have been simpler than to insert..." (*City of Ontario v. Superior Court (1992) 12 Cal. App. 4th 894, 902*) the word "prohibit" into *§11362.83* or *§11362.768*. The legislature has created statutes addressing different subjects using both terms (regulate and prohibit); thus, having an awareness of the difference between these terms and intending here to not permit "prohibition" by excluding said term. (See,

Business Professions Code §§5491.1, 22435.8, 2063; Streets Highways Code §35701; Vehicle Code §22101; Water Code §§31145, 31144.; statutes using both terms, "regulate" and "prohibit")

Under no stretch of logic is the word "consistent" synonymous with permitting municipalities to enact complete prohibitions on what the Legislature found was of paramount importance (as expressed in the preamble to the *MMP*); the establishment of a statewide medical marijuana distribution system through collectives.

Interpreting *§11362.83* as permitting a total ban on conduct authorized by *§11362.775* would obliterate the Legislature's two principle purposes; to 1) have **"uniform and consistent application of the act among the counties"** and **2) "Enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects."** (preamble to *MMP*). The rules of statutory interpretation forbid such an absurd result and one so contrary and "inimical to" the legislature's expressed purposes.

"The fundamental rule of statutory interpretation is to ascertain the intent of the Legislature as to the purpose of the law by first looking at the plain meaning of the words in the statute." *Yolo Co. Dept. of C.P.S. v. Lowery, (2009) 176 Cal.App.4th 1243, 1246.* There is "no indication that the Legislature intended to give the word[] ["consistent" within *§11362.83*]...other than [its] ordinary dictionary meaning[]." *People v. Anderson (1968) 70 Cal.2d 15, 26.* "It is thus safe to say that the "'ordinary"' sense of a word is to be found in its dictionary definition." *Scott v. Cont'l Ins. Co., (1996) 44 Cal. App. 4th 24, 30. Webster's Third New International Dictionary of the English Language Unabridged* (1986) defines "consistent" to mean "marked by harmony, regularity, or steady continuity throughout: showing no significant change, unevenness, or contradiction . . . ." And Black's Law Dictionary defines "consistent" to mean "having agreement with itself or something else; accordant; harmonious; congruous; compatible; compilable; not contradictory." *Black's Law Dictionary (6th Ed. 1990).*

Respondent's ordinance contravenes the plain meaning of the word "consistent"; there is no "agreement with" and is "contradictory" to what the *MMP* permits and is thus not "consistent with the act". (See, *§11362.83)*

Interpretation of the word "consistent" in other contexts lends support for appellant's interpretation. In *Citizens to Save California (CSC) v. California Fair Political Practices Commission (CFPPC) (2006) 145 Cal.App.4th 736*, the court interpreted language nearly identical to the "consistent with" language in *§11362.83*. The court addressed *Government Code §83111*; under that section the Fair Political Practices Commission (FPPC), is delegated authority to administer the Political Reform Act (PRA), but was restricted to enact regulations which are "consistent with[4]" the PRA. (*Id at 746; Government Code §83112*). The court in *CSC, supra,* held that any regulation which "conflicts" with ***either*** the enabling statute's language or the ***purpose*** of the legislation is "inconsistent" and thus said regulation is rendered void. (*Id.* at p. 751 and 754.)

> "Regulation 18530.9 is **at odds with the language** of the PRA. It is also **inconsistent with the legislative intent** underlying the PRA's contribution limits. The effect of regulation 18530.9 is to inhibit a candidate's involvement in the initiative process. Involvement will lead to restrictions on the ballot measure committee's fundraising. **This conflicts with the voter's concern**, as expressed in the ballot proposition, that candidates devote insufficient time to matters of public policy." *(Ibid.)*

This Court has implemented a rule to determine when local laws are not "consistent" with state law; "A local ordinance ***contradicts*** state law when it is inimical to or cannot be reconciled with state law." (emphasis added) *O'Connell v. Stockton (2007) 41 Cal.4th 1061, 1068*. Plaintiff's total ban on defendant's otherwise lawful conduct "contradicts state law" *(Id.)* because it is "inimical to and cannot be reconciled" *(Id.)* with the Legislature's paramount purpose of promoting "uniform" application of the *MMP* and "enhance the access" "through collective, cooperative cultivation projects" to qualified patients. Since respondent's ordinance "contradicts state law" (*Id.*) respondent's actions

[4] The interpretation of an ambiguous statutory phrase may be aided by reference to other similarly worded statutes. *People v. Woodhead* (1987) 43 Cal. 3d 1002, 1008.

necessarily are also not "consistent" with the *MMP*. See, *section 11362.83*. In interpreting *§11362.83* this court should be guided by the following rules of statutory interpretation:

> "To the extent this examination of the statutory language leaves uncertainty, it is appropriate to consider 'the consequences that will flow from a particular interpretation. Where more than one statutory construction is arguably possible, our 'policy has long been to favor the construction that leads to the more reasonable result. This policy derives largely from the presumption that the Legislature intends reasonable results consistent with its apparent purpose. Thus, our task is to select the construction that comports most closely with the Legislature's apparent intent, **with a view to promoting rather than defeating the statutes' general purpose**, and to avoid a construction that would lead to unreasonable, impractical, or arbitrary results." (emphasis added) (citations omitted)
> *Commission on P.O.S.T v. Superior Court (2007) 42 Cal.4th 278, 290.*)

"A court should not adopt a statutory construction that will lead to results contrary to the Legislature's apparent purpose." (emphasis added) *People ex rel. Lungren v. Superior Court (1996) 14 Cal.4th 294, 305.*

"[W]here the main purpose of the statute *is expressed*[,] the courts will construe it so as to effectuate that purpose by reading into it what is necessary or incident to the accomplishment of the object sought." *People v. Melton (1988) 206 Cal.App.3d 580, 592.*

In deciding if *§11362.83* preempts respondent's ordinance, this Court must necessarily be guided by the legislature's twin goals of uniformity of law (none existing if municipalities could ban collectives) and enhancing access to qualified patients through collectives (a Legislative purpose practically vanquished by the city's ordinance as access is eliminated and not enhanced.)

This court must take into account "the consequences that will flow from a particular interpretation" and when "more than one statutory construction is arguably possible, [the] policy has long been to favor the construction that leads to the more reasonable result". (*Commission on P.O.S.T, supra, at 290.*)

Allowing bans would lead to non uniform application of the law with collectives concentrated in limited areas or non existing in entire regions of the state; it would be an

absurd interpretation to conclude this is what the legislature wanted when so many of their words in the *MMP* clearly state otherwise.

California has established a delicate balance, allowing municipalities to "regulate" (*sections 11362.83, 11362.768*), but not ban. This is exemplified by the ruling in *County of Los Angeles v. Hill (2011) 192 Cal. App. 4th 861.* There the court held that the county was free to enact restrictions on when, were, and how collectives operate; however, the court expressly pointed out that a local ordinance can't be based solely on the fact the actors are performing the conduct authorized by *section 11362.775. Hill* reasoned such a conclusion was required because *section 11362.775* exempts medical marijuana collectives from local nuisance laws which are based as here, on nothing more than participating in conduct exclusively authorized under *section 11362.775*;

> "By its terms, the statute exempts qualified patients and their primary caregivers (who collectively or cooperatively cultivate marijuana for medical purposes) from nuisance laws "*solely on the basis* of [the] fact" that they have associated collectively or cooperatively to cultivate marijuana for medical purposes. "
>
> *County of Los Angeles v. Hill (2011) 192 Cal. App. 4th 861, 869.*

County of Los Angeles v. Hill, supra, also held that *section 11362.83* limits the authority of local municipalities to enact the type of total ban ordinance herein challenged, stating: "Thus, section 11362.83 allows a county to regulate the establishment of MMD's and their locations so long as those regulations are consistent with the provisions of the Medical Marijuana Program, sections 11362.7 through 11362.9." *County of Los Angeles v. Hill (2011) 192 Cal. App. 4th 861, 867. Hill* was thus approving the "authority to regulate the particular manner and location" (Id at 869), but also indicating that total bans as here violate *section 11362.83* and *section 11362.775.*

Respondent's enforcement action infringes upon the privileges provided by the Legislature in the *MMP* by completely banning the distribution of collectively cultivated physician recommended marijuana within its borders. No such authority to prohibit what state law otherwise permits was granted by the legislature when enacting the *MMP* nor was the word "prohibit" included in its recent amendment of *section 11362.83.* Respondent has

in essence re-written the *MMP* and eliminated the ability for anyone to exercise the rights afforded under that legislation within its borders. (See, *People v. Urziceanu (2004) 132 Cal.App.4th 747, 785* explaining the broader rights available under the *MMP* which were not available under the *Compassionate Use Act*) Such a stark conflict with the legislature's purpose (see, preamble to the *MMP*) and with *§11362.775*, compels a finding of preemption and a "conflict with general law" in violation of *Cal. Const Art XI Sect 7.* See, *N. Cal. Psychiatric Society v. City of Berkeley (1986) 178 Cal.App.3d 90, at 103-104*,

C. LOCAL ORDINANCES THAT "CONFLICT" WITH STATE LAW ARE UNCONSTITUTIONAL AND VOID BY THE DOCTRINE OF PREEMPTION.

Municipalities may only "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* (emphasis added).) "Under the police power granted by the Constitution, counties and cities have plenary authority to govern, subject only to the limitation that they exercise their power within their territorial limits and subordinate to state law. (*Cal. Const., art. XI, § 7.*) " (*Candid Enter., Inc. v. Grossmont Union High School Dist. (1985) 39 Cal.3d 878, 885.*).[5]

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[5] The ban here touches upon a subject of statewide concern (See Legislative preamble of *MMP*, § 11362.7 *et seq.* declaring the statewide concern when articulating the purpose is to secure uniform application of the MMP throughout California). The appropriate interpretation of this state's medical marijuana laws is "important" and especially of "considerable importance to those who rely on cannabis for medicinal purposes". (*City of Garden Grove v. Superior Court (2007) 157 Cal.App.4th 355, 378.*) Thus, the "home rule" doctrine (*Cal Const. Art.XI Sect.5 Subd. (a)*) does not apply here; this is not a municipal affair. See, *Fiscal v. City & Co.of San Francisco (2008) 158 Cal.App.4th 895, 904* (discussing "home rule" doctrine). [T]he...Ordinance, which prohibits possession by both residents and those passing through..., legislates in an area of statewide concern. (citations omitted) It affects not just persons living in San Francisco, but transients passing through and residents of nearby cities...." *Doe v. City and County of San Francisco (1982)136 Cal.App.3d 509, 513.* "When there is a doubt as to whether an attempted regulation relates to a municipal or to a state matter, or if it be the mixed concern of both, the doubt must be resolved in favor of the legislative authority of the state [citations]." *Abbott* v. *City of Los Angeles (1960) 53 Cal.2d 674, 681*

Respondent's zoning ordinances "conflicts with general law", by attempting through its police power to prohibit all association/collectives established under the authority of §*11362.775* and thus employing a full assault on the core purpose of the *MMP* ("enhance...access" and "uniform application of the law").

In *Fiscal v. City & Co. of San Francisco (2008) 158 Cal.App.4th 895, 911*; the Court recognized that a local ordinance is in "conflict with general laws" (Cal *Const. Art. XI Sect.7*) when it frustrates the purpose of state legislation and struck down a municipal ban on handguns;

> "If the preemption doctrine means anything, it means that a local entity may not pass an ordinance, the effect of which is to completely frustrate a broad, evolutional statutory regime enacted by the Legislature. [Respondent's ordinance banning what state law encourages] stands as an obstruction to the accomplishment and execution of the full purposes and objectives of the legislative scheme regulating [medical marijuana] in this state. For that further reason, it is preempted. (*Sherwin-Williams Co. v. City of Los Angeles, supra*, 4 Cal.4th at pp. 897–898 [local legislation is preempted if it is "inimical" to accomplishment of the state law's policies].)"
>
> *Fiscal v. City & Co.of San Francisco, supra., 158 Cal.App.4th at 911.*

Respondent's ordinance does not "enhance" access; instead, it eliminates it and prohibits it to the point that respondent has confessed they prefer to see authorized users get on California's freeways and travel to distant parts rather than allow the access permitted by state law. Nor does respondent's ordinance "assure uniform application of the law" throughout the state; it is the admitted goal of respondent's ordinance to contradict the expressed purpose of the *MMP* .

Thus, this is not a "regulation" of "location" or on what rules one must comply with to become an "establishment" as the legislature now has expressly permitted under *section 11362.83*; instead the issue and problem with respondent's ordinance is concisely and eloquently explained by Justice Ruvolo in the *Fiscal* opinion; explaining that

> We acknowledge courts have found, in the absence of express preemptive language, that a city or county may make additional regulations, different from those established by the state, if not inconsistent with the purpose of the general law. (citations omitted) We further acknowledge that, in spite of

> the [MMP's] enactment, room has been left by the Legislature for some quantum of local ... sales regulation (citations omitted) **But, this case is not one where a local entity has legislated in synergy with state law**. To the contrary, here the state and local acts are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. (citations omitted) ...**The City is not simply imposing additional restrictions on state law to accommodate local concerns; but instead, it has enacted a total ban on an activity state law allows**. This difference was recognized in *Great Western [Shows v. County of Los Angeles (2002) 27 Cal.4th 853],* which noted that **total bans are not viewed in the same manner as added regulations, and justify greater scrutiny**. (*Great Western, supra,* 27 Cal.4th at pp. 867–888.) Therefore, we agree that with the passage of the UHA, the Legislature has impliedly preempted local ordinances,..., which completely bans the sale of all handguns. (emphasis added)
>
> *Fiscal supra, 158 Cal.App.4th at 916.*

In *Great Western Shows v. County of Los Angeles (2002) 27 Cal.4th 853, 868* this Court reflected on bans which could be imposed under the authority of state statutes permitting local regulation and explained they are likely preempted;

> "...when a statute or statutory scheme seeks to promote a certain activity and, at the same time, permits more stringent local regulation of that activity, local **regulation cannot be used to completely ban the activity or otherwise frustrate the statute's purpose**. These cases are therefore distinguishable from the present one in at least two respects: First, unlike the RCRA, there is no evidence either in the gun show statutes or, as far as we can determine, in their legislative history, that indicates a stated purpose of promoting or encouraging gun shows." (emphasis added)
>
> *Great Western, supra,* 27 Cal.4th at 868.

The legislative "purpose of promoting or encouraging" that was absent in the facts in *Great Western* is however present here. Appellant stresses the two express purpose of the *MMP* is to "enhance" access to medical marijuana through the very institutions banned by respondent's ordinance and securing uniform application of the law throughout California. Appellant also stresses the *MMP* is the distribution system which the voters when passing the *CUA* asked the Legislature to pass. Thus, the *MMP* both encourages and promotes the conduct banned by respondent's ordinance and under those circumstances

"local regulation cannot be used to completely ban the activity or otherwise frustrate the statute's purpose". *Great Western, supra,* at 868.

In *Big Creek Lumber Co. v. County of Santa Cruz (2006), 38 Cal. 4th 1139* this Court again explained the difference between an ordinance which dictates WHERE certain activity permitted by state law must occur versus a total prohibition of conduct permitted by state law. The ordinance at issue in *Big Creek* required certain logging operations to occur at specified locations within the county. However, key to this Court's decision was the finding that the ordinance did not ban logging operations at all locations. Stating that;

> "Plaintiffs' overriding concern appears to be that localities may by locational zoning prohibit timber harvesting altogether. The ordinance before us does not have that effect, nor does it appear that any county has attempted such a result. The zone district ordinance permits timber harvesting on parcels zoned timberland production, mineral extraction industrial, and parks, recreation and open space. To require that commercial timber harvesting occur on land in a "timberland production" or other specified zone is no more a ban on timber harvesting than a regulation requiring that industrial land uses occur on land zoned "industrial" is a ban on factories."
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> *Big Creek Lumber Co. v. County of Santa Cruz supra., 38 Cal. 4th at 1160-1161.*

Big Creek reasoned that the local ordinance didn't ban conduct state law permitted;

> "We previously have explained that a local ordinance is not impliedly preempted by conflict with state law unless it "...forbid[s] what state law expressly mandates." (*Great Western Shows, Inc. v. County of Los Angeles, supra,* 27 Cal.4th at p. 866.) That is because, when a local ordinance "does not prohibit what the statute commands...," the ordinance is not "inimical to" the statute. (citations omitted)
>
> Here, County's ordinances are not impliedly preempted by conflict with state forestry law because it is reasonably possible for a timber operator to comply with both. The zone district ordinance does not...forbid[] what general forestry law mandates. While the forestry laws generally encourage "'maximum sustained production of high-quality timber products ... while giving consideration to'" competing values (citations omitted), they do not require that every harvestable tree be cut. Accordingly, County's zoning ordinance does not conflict with state law simply because it may have the effect of placing some trees, at least temporarily, off limits to logging."
>
> *Big Creek Lumber Co. v. County of Santa Cruz supra., 38 Cal. 4th at 1161.*

Here by contrast respondent's ordinance does not simply seek to place conduct authorized by the *MMP* in selected areas, or even limited areas of the city, the ordinance expressly bans what state law permits. Thus, this is not a situation wherein respondent's ordinance "may have the effect of placing some trees, at least temporarily, off limits to logging" (*Id*) instead it bans state authorized conduct all the time and into the future.

When one complies with *section 11362.775* they are not complying with respondent's ordinance; thus, "the purported conflict is in fact a genuine one, unresolvable short of choosing between one enactment and the other." *California Fed. Savings & Loan Assn. v. City of Los Angeles (1991) 54 Cal.3d 1, 17.*

This is not an attempt to enact local laws declaring where appellants institution should be located but an attempt to inject respondent's view whether the conduct already authorized by state law should occur at all and implementing that view within its municipal borders. Moreover, the "clear indication of preemptive intent" over land use regulations was not intended by this court to dispense with the rule of implied preemption and was not intended to apply to a ban only ordinances fixing "locations". As stated by this Court in *Big Creek:*

> "Thus, when local government regulates in an area over which it traditionally has exercised control, such as the **location** of particular land uses, California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is *not* preempted by state statute. (citations) The presumption against preemption accords with our more general understanding that it is not to be presumed that the legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication." (emphasis added)
>
> *Big Creek Lumber Co. v. County of Santa Cruz supra., 38 Cal. 4th at 1149-1150.*

Respondent's ordinance is not a traditional attempt to "exercised control, such as the **location** of particular land uses" (*Id*) it is an attempt to reverse and totally ban what the legislature has authorized not just determining its "location". It is not a "long-established

principle[] of law" to allow municipalities to forbid what the legislature has permitted and disguise it as a land use zoning regulation.

In *San Diego Tuberculosis Assoc. v. East San Diego (1921) 186 Cal. 252* this Court was called upon to address the validity of an ordinance which prohibited all hospitals treating tuberculosis from operating anywhere within East San Diego ("heavy handed" enforcement of that goal is noted in the facts of the case). While here the case for preemption is stronger in that the legislature has expressly authorized the conduct and expressly encouraged it when they declared its purpose in the MMP, *San Diego Tuberculosis Assoc* is nevertheless instructive on the issue of the invalidity of respondent's ban. This Court stated:

> "The exercise of the police power cannot be made a mere cloak for the arbitrary interference with or suppression of a lawful business. (citations omitted) Such prohibition is very different from regulation and can be justified only on the ground that such a hospital, no matter how well conducted, is a menace to the public peace, morals, health, or comfort. That a well-conducted, modern hospital, even one for the treatment of contagious and infectious diseases, is not such a menace, but, on the contrary, one of the most beneficent of institutions, needs no argument. There is not the slightest danger of the spread of disease from it, and this is the only possible ground on which objection could be made to it. We have no hesitation in holding an ordinance prohibiting the maintenance anywhere within a city of an institution so necessary in our modern life and so beneficent to be wholly unreasonable and invalid."
>
> *San Diego Tuberculosis Assoc. v. East San Diego, supra, 186 Cal. at 254.*

The *MMP* presents a slightly different case than in *San Diego Tuberculosis Assoc* in that the legislature through the enactment of the *MMP* and the expression of its purpose have already made certain decisions; i.e. permitting "regulations" but not permitting bans. Such a legislative declaration was absent in *San Diego Tuberculosis Assoc*. The legislature already weighed the risks of having medical marijuana collectives and decided that "regulat[ion]" of "location" and "establishment" under *sections 11362.83* and *11362.768* was sufficient local control. Despite respondent's concerns over medical marijuana collectives, they have presented no evidence (or have been able to obtain any over the years) at all that appellants have ever created a nuisance in fact. Respondent's "prohibition is very different from regulation and can be justified only on the ground that such a

hospital, no matter how well conducted, is a menace to the public peace, morals, health, or comfort." *Id at 254* Respondent has failed to establish this standard as the very facts of this case and the determinations of the legislature in permitting regulations demonstrate that a well conducted medical marijuana collective is not a "menace to the public peace, morals, health, or comfort." *Id at 254*

"However laudable its purpose, the exercise of police power may not extend to total prohibition of activity not otherwise unlawful." *People ex rel. Younger v. County of El Dorado (1979) 96 Cal. App. 3d 403, 406.* "Thus there is recognized the incontestable proposition that the exercise of the police power,..., cannot extend beyond the necessities of the case and be made a cloak to destroy...rights" created by the *MMP. House v. Los Angeles County Flood Control Dist., (1944) 25 Cal. 2d 384, 388-389.* While the court in *House* was addressing property rights, the same scrutiny should apply here-in the end this ordinance is respondent's method of stopping implementation of the *MMP*. Rather than regulate as directed by the legislature, respondent instead prohibits conduct the legislature already debated the wisdom of it being able to occur.

Even local legislation fixing locations cannot conflict with the Legislative purpose behind statewide statutes. *City of Torrance v. Transitional Living Centers (1982) 30 Cal.3d 516*, invalidated a municipal law excluding residential treatment facilities for the mentally disturbed, finding it conflicted with the Legislature's purpose in having residential facilities. The court indicated the importance of taking the Legislative purpose into account in determining if local legislative actions are preempted and in doing so found that a statute similar to *section 11362.83* "did *not* permit the **exclusion**..." *Id at 521* of state sanctioned and encouraged conduct.

> "It seems self-evident that...the Legislature intended to promote and encourage the treatment of mental patients within a community by limiting the ability of municipalities to discriminate, through zoning restrictions,..." (emphasis added)
>
> *City of Torrance v. Transitional Living Cntr, supra., 30 Cal.3d* at *521.*

Cohen v. Board of Supervisors (1985) 40 Cal.3d 277, at 293, also requires this Court to find that an attempt by a municipality to ban what the state has expressly permitted (or more accurately here permitted and encouraged the conduct as part of a greater policy) is an ordinance "in conflict with general laws." (*Cal. Const., art. XI, § 7*) . In *Cohen* the preemption argument raised was that a local regulatory scheme over "escort services" was preempted by the singular Penal Code section prohibiting prostitution. The court held that there being no state law at all which applied to "escort services", a city, in those circumstances, may enact regulations to prevent criminal acts such as prostitution. However the court in *Cohen* was also careful to point out that, "If the ordinance were in substance a criminal statute which attempted to prohibit conduct proscribed or permitted by state law either explicitly or implicitly, it would be preempted." *Id at 293. Cohen* also held that "impos[ing] a sanction for engaging in" (*Cohen supra,* at 295) conduct otherwise authorized by state law is sufficient to render the local ordinance void. Clearly, respondent's ordinance imposes a major sanction; abatement lawsuits seeking attorney's fees and enforced with injunctions prohibiting conduct explicitly authorized by state law and done so "solely on the basis of th[e] fact" (*§11362.775)* IEPHWC is doing what the *MMP* otherwise permits. This is precisely what the reference to *§11570* as an excluded nuisance civil cause of action for this conduct was meant to prevent. (*§11362.775)*

In *California Grocers Assn. v. City of Los Angeles, (2011) 52 Cal. 4th 177* this court interpreted its holding in *Cohen supra*, and did so consistent with appellants' argument. The court there stated:

> "Thus, in *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, we upheld against a preemption challenge a local ordinance requiring a permit to provide an escort service. The state had impliedly occupied the field with respect to the criminalization of prostitution and sexual conduct. (citations omitted) Although the ordinance's likely purpose was to reduce vice and deter conduct proscribed by the state, this purpose did not support preemption: '"An ordinance is not transformed into a statute prohibiting crime simply because the city uses its licensing power to discourage illegitimate activities associated with certain businesses. Most licensing ordinances have a direct impact on the enforcement of state laws which have been enacted to preserve the health, safety and welfare of state and local citizens. This fact does not deprive a municipality of the power to

enact them.'" (*Cohen*, at p. 299.) The ordinance in actual effect did not enter the field of criminalizing sexual conduct, but only controlled who might operate an escort service, leaving the regulation of any such conduct to the state; as such, it was not preempted."

California Grocers Assn. v. City of Los Angeles, supra, 52 Cal. 4th at 190-191.

Here, respondent's ordinance seeks to ban that which the state has said it will retain full control over, i.e. the state has exclusive control over permitting the conduct participated in by appellants or not permitting it. Respondent thus is not simply seeking to "control[] who might operate" an association formed under *section 11362.775* or seeking to enforce an ordinance as in *Cohen* that is simply "requiring a permit to provide an escort service", instead respondent's ordinance prohibits conduct authorized by state law. Here, respondent's "Ordinance [does not] promote[] the same goals as the enactment of a higher governmental authority" and "enter[s] the field that enactment preempts" (*California Grocers Assn. v. City of Los Angeles, supra, 52 Cal. 4th at 192*), i.e., enacting local laws not consistent with the *MMP*.

The holding in *O'Connell v. Stockton (2007) 41 Cal.4th 1061 at p. 1069*, requires a finding of preemption here. The court held that a provision of the Stockton Municipal Code forfeiting vehicles used to solicit prostitution was preempted by the Uniformed Controlled Substance Act ("UCSA"). Just as it has at times by respondent, it was argued by the City of Stockton in *O'Connell* that since the UCSA did not discuss forfeiture for prostitution, municipalities were free to legislate in that area. The *O'Connell* court rejected that method of determining if preemption existed and instead found that the UCSA was a comprehensive statutory scheme which governed forfeiture of vehicles as a penalty for specific violations of the UCSA and its pervasiveness preempted any local ordinance dealing with the same subject.

Respondent has argued that because the legislature did not express their will to their level of liking they are able to ban the conduct under their authority to regulate "land use" and thus their ordinance is "consistent" with an *MMP*. This is similar reasoning articulated by the dissent in *O'Connell v. Stockton (2007) 41 Cal.4th 1061*; taking the position that if the Legislature is silent in a specific area of law, a local municipality may

regulate that specific area (i.e. they may forfeit cars for prostitution because the Health and Safety Code was silent on those acts-stating: "In fact, "the [UCSA] is silent with regard to vehicles used by drug *buyers*" and recognizing that "The majority's reasoning, if accepted, requires preemption on an all-encompassing basis." Justice Corrigan dissenting, *Id at 1077-1078*).

The majority held that the dissent's position, requiring a complete laundry list of specific areas of law over which state preemption applies, is not required; the ordinance simply needs to be "inimical to or cannot be reconciled with state law" to be preempted. *Id at 1068*.

Thus, one looks at the effect the local law has on statewide policy created by the state's legislation not whether the legislature specifically spoke up about a subcomponent of the subject. "In determining whether the Legislature has preempted by implication to the exclusion of local regulation we must look to the whole purpose and scope of the legislative scheme." (emphasis added) *People ex rel. Deukmejian v. County of Mendocino, supra,* 36 Cal.3d at p. 485.

A local ordinance which bans conduct the state has 1) made lawful (*section 11362.775*); 2) encouraged the conduct in its expressed legislative purpose (i.e., "Enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." [2003 Cal SB 420 § 1; 2003 Cal ALS 875; See, Legislature's preamble to the *MMP*]); 3) made the conduct part of an intended distribution system (see, *Urziceanu, supra, at p.785,§11362.5 subd. (b)(1)(C)*); and 4) has expressed a desire for state wide uniformity on those policies [See, Legislature's preamble to the *MMP*], deserves the label of "inimical" to those concepts and is preempted by state law under *O'Connell.*

Moreover, the concerns expressed by the dissent in *O'Connell* are not present in this case. First the dissent in *O'Connell* noted the following not present in this case; "It is difficult to conclude that the Legislature intended to deprive a person of freedom for simple possession, but intended to protect an automobile from forfeiture in only very serious cases of drug manufacture and sale. Certainly the Legislature has not said that was its intent and

no legislative history has been cited to support that conclusion." (Justice Corrigan dissenting, *Id at 1078*).

The legislature had as its central purpose in passing the *MMP* the creation of a distribution system in response to the voter's request to do so. The legislature expressly declared that its purpose was to "enhance" access to medical cannabis through collective cultivation projects just like the ones banned by respondent and that it wanted to secure "uniform" application of the *MMP* throughout California.

In creating a delicate balance, the Legislature gave municipalities the ability to enact local laws "consistent" with the *MMP* (*§11362.83*) as well as the ability to "regulate" "location" and "establishment" (see, *§11362.83, §11362.768, County of Los Angeles v. Hill, supra*).

The legislature never expressed a desire to give municipalities authority to ban and frustrate its central purpose. This is not a situation where "the ordinance covers an area undisturbed by the UCSA" (Justice Corrigan dissenting, *Id at 1078*); the very preamble to the *MMP* encourages the existence of these institutions. The dissent was also concerned with the blight caused by traffic which flows for the purpose of unlawful acts of prostitution and controlled substance buying, stating that "It should not be the case that local governments require the permission of the state to protect their own citizens from nuisances that profoundly affect their quality of life and the quiet enjoyment of their own property." (Justice Corrigan dissenting, *Id at 1080*). That is not the case here. First, respondent's ordinance is a nuisance per se ordinance which ropes in "the good the bad and the ugly". Second, respondent can't point to any nuisance in fact conduct on the part of appellants. Third, the legislature has provided extraordinary tools (*§11362.83; §11362.*768) that permit municipalities to set rules of location and establishment which are more than sufficient to combat respondent's concerns over medical cannabis associations.

Also applicable here is *N. Cal. Psychiatric Society v. City of Berkeley (1986) 178 Cal.App.3d 90, at 103-104*. There, the trial court struck down as preempted, a local ordinance which banned the use of electro shock therapy (ECT) for psychiatric patients. Just as under the *MMP* here, the *Welfare and Institutions code* in that case contained a

provision which gave patients the ability to choose ECT as a therapy. The purpose and history of that state statute also supported patient choice. Because the Berkeley ordinance banned the use of ECT and state law permitted a patient to chose that treatment the ordinance was struck down. Just as maintained by appellants here (i.e., local ordinance can't conflict with the purpose of statewide law), the court found Berkeley's total ban conflicted with the legislative purpose of state law and was thus preempted. "By enacting an outright, unconditional ban on the administration of ECT within its own borders, Berkeley has created an apparent conflict with the state legislative statutory scheme and its guarantee to all mentally ill persons of a "'right to treatment services which promote the potential of the person to function independently.'"...This conclusion is supported by the history of the provisions of the LPS Act dealing with ECT." (emphasis added) *Id at 104.*

The court concluded that: "In light of this legislative history...we conclude that the total ban on ECT contained in Berkeley's Ordinance 5504 is in direct conflict with the Legislature's intention both that ECT be available...and that the free choice of every psychiatric patient to take or not take ECT be protected." (emphasis added) *Id at 105-106. N. Cal. Psychiatric Society* dictates that a municipality can't ban a controversial medical treatment the state has expressly permitted citizens to use.

The Attorney General has also issued an opinion regarding preemption of the *MMP* over local legislation which merits serious consideration; it, articulates that "**a city program that defined 'attending physician' and 'primary caregiver' more narrowly than state law would be preempted to the extent that it prohibited what state law expressly permitted.**" (*80 Opinions California Attorney General 113, 117-118, 2005 Cal. AG LEXIS 17 (2005).*) A ban on permitted activities thus is preempted under the Attorney General's analysis.

Respondent's ordinance is thus "prohibiting conduct...permitted by state law" (*Cohen supra, 293)* and because here the conduct is expressly authorized by state law (*§11362.775*) it is "conduct... permitted by state law...explicitly or implicitly, [and] it would be preempted." (*Cohen supra at 293.*)

Further, the Legislature has explicitly provided, in *§11362.83* that a local governing body will exclusively be allowed to adopt and enforce laws "**consistent with**" the *MMP* and its comprehensive scheme which includes dozens of statutes addressing just about every area of the subject which the legislature could conceivably cover.

There is a clear indication by the Legislature that **ANY** local ordinance that is not "consistent with" the *MMP* (i.e., bans what it permits) will be preempted by the *MMP*. "[B]y enacting an outright, unconditional ban on the administration of [medical marijuana] within its borders" (*N. Cal. Psychiatric Society v. City of Berkeley (1986) 178 Cal.App.3d 90, at 103-104*) respondent "has created an apparent conflict with the state legislative statutory scheme and its guarantee to all [qualified medical cannabis patients]" (*Id.*) of uniform application of the law, of enhanced access, of the right to associate in order to obtain cannabis and the ability to form collectives as encouraged by the Legislature (See, Legislative Preamble at *§11362.7*) and provided for by *§11362.775*.)

III.

THE DECISION IN *QUALIFIED PATIENT'S ASS'N V. CITY OF ANAHEIM*, WHILE NOT EXPLICITLY DECIDING THE ULTIMATE ISSUE OF WHETHER THE *MMP* PREEMPTS MUNICIPAL ORDINANCES PROHIBITING CONDUCT APPROVED UNDER THE *MMP*, IT ABROGATED ARGUMENTS RAISED BY RESPONDENT IN SUPPORT OF A BAN ON ASSOCIATION / COLLECTIVES.

Qualified Patient's Association v. City of Anaheim, infra, addressed arguments raised by respondent in defense of a total ban on association/collectives.

A. *CLAREMONT V. KRUSE* AND *CORONA V. NAULLS* ARE DISTINGUISHABLE FROM THE FACTS IN THE PRESENT CASE.

"A litigant cannot take shelter under a rule announced in a decision that is inapplicable to a different factual situation in his own case,..." *Harris v. Capitol (1991) 52 Cal.3d 1142, 1157.* The court in *QPA v. City of Anaheim (2010) 187 Cal.App.4th* 734, found that *City of Claremont v. Kruse (2009) 177 Cal.App.4th 1153, at 1175*[6] and *City of*

[6] Holding that in light of the language of *section 11362.83* establishment of a "**temporary** moratorium" was not preempted by state law.

Corona v. Naulls (2008) 166 Cal.App.4th 418[7] were limited to temporary moratoriums and not applicable to total bans on association / collectives. (*See, QPA v. City of Anaheim (2010) 187 Cal.App.4th 734,* fn.4.) Here, respondent has not just enacted a temporary moratorium pursuant to *Government Code §65858* as was the case in *City of Claremont, supra* and *City of Corona, supra.* (*City of Claremont, supra, 177 Cal.App.4th 1153, at 1160.*) Respondent has banned all association collectives, even if in one's home, in a tent or a cardboard box in the driveway. (See, CT 54 for definition of "Medical Marijuana Dispensary" under the *Riverside Municipal Code*) Respondent's ban is also enforceable with criminal sanctions. *(*See, *Riverside Municipal Code §1.01.080,* violation of city zoning ordinance is a misdemeanor.) "Neither case can be properly read to extend that limited preemption inquiry to a case such as this one involving a local government's attempt to enact an absolute and total ban...on all property, public and private, within its geographic jurisdiction." *Fiscal v. City and County of San Francisco (2008) 158 Cal. App. 4th 895, 918.*

The issue before the court in *City of Claremont, supra,* was whether the *MMP* "preempts the city's enactment of a moratorium"..." (*Id at 1168*). The court reviewed *§11362.83* and determined that an adoption of a "**temporary** moratorium" was not preempted. (*Id at 1175.*) Nothing in *City of Claremont* sanctions a **complete** ban; *City of Claremont*, simply did not consider a total **permanent** ban and if those specific actions by a municipality are "consistent" with the *MMP*. (See, *§11362.83*)

City of Corona, supra, also did not consider whether the ordinance was preempted by state law; the court explicitly stated it would not reach or rule on that issue. *Id at 425* Instead, the court in *City of Corona, supra,* focused on whether the trial court's legal interpretation that "[a]ny use not enumerated [in the City's municipal code] is presumptively prohibited", was legally correct. (*City of Corona, supra, 166 Cal.App.4th 418, 430.*) In the present case the local ordinance expressly excludes the medical

[7] The court in *City of Corona, supra,* focused on whether there was sufficient legal basis for the court's finding that "[a]ny use not enumerated [in the City's municipal code] is presumptively prohibited."

marijuana association as a permitted use. The issue of preemption was simply not raised nor considered by the court in *City of Corona, supra* as it pertains to a total ban.

"[B]oth cases [*City of Claremont* and *City of Corona*] involved temporary moratoriums rather than the permanent dispensary ban alleged here. Again cases are not determinative for issues not considered." (*QPA v. City of Anaheim (2010) 187 Cal.App.4th 734, fn.4.*).

B: THE DECISION IN *ROSS V. RAGING WIRE* IS NOT AUTHORITY PERMITTING MUNICIPALITIES TO COMPLETELY BAN ASSOCIATION/ COLLECTIVES.

The decision in *Ross v. Raging Wire Telecommunications, Inc. (2008) 42 Cal.4th 920* (*Ross*) did not establish authority permitting municipalities to completely ban association / collectives. Specifically, *QPA, supra,* held that the decision in *Ross, supra,* "did not involve the MMPA .... ['An opinion is not authority for propositions not considered.']" *QPA v. City of Anaheim, supra, 187 Cal.App.4th at 754.* Moreover, as observed by this Court in *Ross*, "Plaintiff's interpretation might be plausible if the failure to infer a requirement of accommodation would render the statute meaningless, but such is not the case." *Ross v. Raging Wire Telecommunications, Inc. supra, 42 Cal.4th at 931.* Here, the legislature's purpose behind the creation of the *MMP* and what it permits under *section 11362.775* would be meaningless if municipalities could ban the conduct altogether. The absurd results would be to have concentrated pockets permitting the conduct and qualified patients having to travel unknown distances. In referring to one of the statutes in the *MMP* which provided that no accommodations at the place of employment are required, the court in *Ross* also observed that "In any event, given the controversy that would inevitably have attended a legislative proposal to require employers to accommodate marijuana use, we do not believe that Health and Safety Code section 11362.785, subdivision (a), can reasonably be understood as adopting such a requirement silently and without debate." *Id at 931.*

Here, the silence and lack of legislative debate absent in *Ross* is instead present here. The legislature expressed that its central purpose in enacting the *MMP* was to

enhance access of medical cannabis through collectives formed under the authority of *section 11362.775*; the legislature was aware that some local control would be needed and thus created *section 11362.83* and permitted local laws "consistent" with the *MMP*. Later the legislature expanded on this concept by amending *section 11362.83* and also creating new legislation (*section 11362.768)* permitting local laws which "regulate" "location" and "establishment" but with the requirement they still be "consistent" with the *MMP*.

Certainly the legislature was not assuming the absurd, i.e., that the conduct authorized by *section 11362.*775 and encouraged in their preamble to the *MMP* would occur on floating barges in the Pacific Ocean. Instead, the language of the *MMP* makes it unmistakable the conduct would occur at various land locations throughout California. *QPA* noted as much when they found that;

> "Unlike in *Ross*,..., the MMPA explicitly touches on land use law by proscribing in sections 11362.765 and 11362.775 the application of sections 11570, 11366, and 11366.5 to uses of property involving medical marijuana. Here,..., it appears incongruous at first glance to conclude a city may criminalize as a misdemeanor a particular use of property the state expressly has exempted from "criminal liability" in sections 11362.765 and 11362.775."
> *QPA v. City of Anaheim, supra, 187 Cal.App.4th at 754.*

While here the issue is enforcement through injunction and not a criminal proceeding, the "proscribing in sections 11362.765 and 11362.775 the application of sections 11570" (*Id*) lends to the same result; i.e. "it appears incongruous at first glance to conclude a city may [declare a nuisance per se] a particular use of property the state expressly has exempted from [civil nuisance cause of actions] in sections 11362.765 and 11362.775". *Id at 754.*

C: *CITY OF CLAREMONT V. KRUSE* CONFLICTS WITH VARIOUS HOLDINGS OF THE CALIFORNIA SUPREME COURT AND WITH HOLDINGS OF THE CALIFORNIA COURTS OF APPEAL AND LIKELY WAS WRONGLY DECIDED AS THE DECISION IS EXCLUSIVELY BASED ON CLEARLY WRONG ASSUMPTIONS AND PREMISES.

The holding in *City of Claremont, supra,* conflicts with this Court's decisions in *Cohen, supra,* 40 Cal.3d 277 [holding that any ordinance which prohibits conduct authorized by state law is preempted.]; *City of Torrance, supra, 30 Cal.3d 516* [holding

that a statute similar to *Health and Safety Code section 11362.83* "did not permit the exclusion ..." of otherwise state sanctioned and encouraged conduct.]; and *O'Connell, supra, 41 Cal.4th 1061* [holding that local legislation which is "inimical" to a state wide law is preempted]. Moreover, the following statement ("The MMP does not address the licensing or location of medical marijuana dispensaries, nor does it prohibit local governments from regulating such dispensaries." *City of Claremont, supra 1175*) is precisely the approach rejected by the *O'Connell* majority (what is not expressly included in state law the cities may occupy). In that light *City of Claremont* starkly conflicts with the holding and approach in *O'Connell, supra, 41 Cal.4th 1061. See, Auto Equity Sales v. Superior Court (1962) 57 Cal.3d 450, at p. 456.*

City of Claremont, supra, conflicts with several court of appeal decisions (*N. Cal. Psychiatry Society v. Berkeley (1986) 178 Cal.App.3d 90, at pp. 103-104 (*discussed *supra)*; *A & B Cattle Co. v. Escondido (1987) 192 Cal.App.3d 1032 (*holding that state law on drug paraphernalia was sufficient to exclude regulation in other areas not covered by state law because local laws would "burden" state law); *People v. Urziceanu (2004) 132 Cal.App.4th 747, at p. 785*). A two year moratorium is not a "regulation" on "establishment" or "location" as permitted by *section 11362.83*, but instead a 2 year complete ban and a heavy burden on those in the local community who are qualified patients who wish to associate and form a collective.

Its rationale is also wrong. *City of Claremont* makes the incorrect allegation that "Medical marijuana dispensaries are not mentioned in the text or history of the MMP". *City of Claremont at 1175*. Perhaps the "text and history" were not written with the vernacular the *City of Claremont* panel was searching for, because the phrase "medical marijuana dispensary" is not mentioned anywhere in the *MMP*. Given the "dramatic change in the law" (See, *Urziceanu supra,785*) the Legislature created by enacting *§11362.775*, including its exemption from sales laws, and the provision for the creation of medical marijuana qualified patients "associations" (the Legislature's chosen vernacular), *City of Claremont* was wrong to conclude the subject of medical marijuana

collectives was "not mentioned in the text or history of the MMP". *City of Claremont at 1175.*

The enactment of the *MMP* has as its express purpose the "enhance[ment]" of availability to qualified patients through these very institutions and the section permitting for the creation of "associations" (*§11362.775*) was the Legislature's response to the voter's demand when they enacted *proposition 215* that they create methods for the safe distribution. (See, *Urziceanu supra,785*) *Kruse* was wrong when it concluded that "dispensaries" were not discussed in the "text and history" of the *MMP*; quite to the contrary the Legislature enacted statutes (*§11362.775*) allowing for the proliferation of "association[s]" and made the existence of them a central goal to meet its objectives (i.e., "enhance the access") as one of its express purposes and even enacted provisions prohibiting conduct in certain locations (§ 11362.79 and §11362.785) and limited municipal authority, only permitting ordinances "consistent" (*§11362.83*) with the *MMP*, and expressly allowing only "regulation" of "establishment" and "location".

The *City of Claremont* decision is also wrongly decided in that it failed to note that *§ 11570* is exclusively civil in nature, and failed to note the immunities provided by *§11362.775* were not limited to criminal matters; it incorrectly stated: "The operative provisions of the MMP...provide limited criminal immunities under a narrow set of circumstances." *City of Claremont at 1175.* "[T]he Legislature [ ] exempted those...who collectively or cooperatively cultivate marijuana for medical purposes from...**the laws declaring the use of property for these purposes a nuisance."** *People v. Urziceanu (2004) 132 Cal. App. 4th 747, 785.*

City of Claremont did not include a reasonable interpretation of *§11362.775* and *§11362.83*; its holding is in direct conflict with the *MMP*'s express legislative purpose. The Cannon of statutory interpretation which dictates that a "court should not adopt a statutory construction that will lead to results contrary to the Legislature's apparent purpose" (*People ex rel. Lungren v. Superior Court, supra, 14 Cal. 4th at 305*) was apparently not applied. While the opinion mentions that it referred to the "text or history of the *MMP*" (*City of Claremont at 1175)* the opinion does not articulate the legislative

preamble nor explain how it is that allowing a lengthy 2 year ban ("moratorium") "enhances the access" or creates "uniform application" of the *MMP* throughout the state.

Under no stretch of logic can a local ordinance banning conduct explicitly made part of a statewide policy be "consistent with the article" (*§ 11362.83*) when one applies the express purpose of the *MMP* which is to "enhance the access" to all patients, secure "uniform and consistent application of the act among the counties" and "promote the fair and orderly implementation of the act". (*Stats. 2003, ch. 875, § 1; 2003 Cal ALS 875 § 1*) Allowing every municipality in California to enact local ordinances banning what the *MMP* encouraged is not the "uniform and consistent application of the act among the counties" the Legislature wanted.

IV.

RESPONDENT'S REFUSAL TO OBEY THE *MMP* ON THE BASIS THAT IT VIOLATES THE FEDERAL CONTROLLED SUBSTANCE ACT, VIOLATES THE STATE CONSTITUTION'S PROHIBITION ON ADMINISTRATIVE AGENCIES REFUSAL TO OBEY LAWS WHEN THEY CONFLICT WITH FEDERAL LAW.

Respondent has relied on *Riverside Municipal Code §19.150.020* which "strictly prohibits any use which is prohibited by state and/or federal law." While respondent abandoned this justification, it is nevertheless a justification for the ban expressed in respondent's ordinance.

Article III, Section 3.5 of the *California Constitution* prohibits the rationale respondent has put forth for banning defendant's otherwise lawful conduct

"[S]ection 3.5 of article III...withholds from administrative agencies the power to determine the constitutional validity of any statute..." (*Greener v. W.C.A. Board (1993) 6 Cal.4th 1028, 1038.*) "[t]here are no decisions holding that federal law renders the [MMP] Act unconstitutional or otherwise unenforceable." *County of Butte v. Superior Court, Supra., at 740.*

QPA v. Anaheim (2010) 187 Cal.App.4th 734 recently held, that the California CUA and MMP are not preempted by federal law. *QPA v. City Anaheim at 757.*

Further, the court in *QPA, supra,* held that local municipalities do not have the authority to enforce federal law; "Just as the federal government may not commandeer state officials for federal purposes, a city may not stand in for the federal government and rely on purported federal preemption to implement federal legislative policy that differs from corresponding, express state legislation concerning medical marijuana." (*Id.* at 757)

Our state's medical marijuana laws cannot be ignored by our state officials because they conflict with federal law. (*County of San Diego v. San Diego NORML (2008) 165 Cal.App.4th 798*; *County of Butte v. Superior Court (2009) 175 Cal.App.4th 729, 740*; *City of Garden Grove v. Superior Court (2007) 157 Cal.App.4th 355, 385*; *People v. Tilehkooh (2003) 113 Cal.App.4th 1433, 1445-1447.*

Federal law does not requires respondent ban medical marijuana collectives.

CONCLUSION

Respondent's ordinance bans activities which are otherwise lawful under express state law and is thus preempted by the *Medical Marijuana Program* as it interferes with the express purpose of the legislation.

Dated: February 14, 2012

J. DAVID NICK
Attorney for Appellants

WORD COUNT CERTIFICATE PER RULE 8.360 (b)(1)

I J. David Nick certify that this brief contains **13,729 words** pursuant to the Word program used to create this brief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 15, 2012 at San Francisco, California.

J. DAVID NICK

PROOF OF SERVICE

I, the undersigned, declare as follows:
I am employed in the City and County of San Francisco, State of California; I am over the age of eighteen years and not a party to the within entitled action; my business address is 345 Franklin Street, San Francisco, CA 94102.

On this date, I caused to be served a true copy of the attached document(s):

APPELLANTS' BRIEF ON THE MERITS BEFORE THE CALIFORNIA SUPREME COURT

on parties named below, addressed as follows:
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(x) BY MAIL: I placed said documents in a sealed envelope, with the appropriate postage thereon fully prepaid for first class mail, for collection and mailing at San Francisco, California, following ordinary business practices.

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Executed on February 15, 2012 at San Francisco, California.

J. DAVID NICK