Case No. S198638

SUPREME COURT
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In the

Supreme Court of California

CITY OF RIVERSIDE,

Plaintiff and Respondent,

v.

INLAND EMPIRE PATIENT'S HEALTH and WELLNESS CENTER, INC., et al.

Defendants and Petitioners.

After a Decision By the Court of Appeal
Fourth Appellate District, Division Two
Case No. E052400 (Riverside County Superior Court Case No. RIC10009872 - Honorable John D. Molloy)

RESPONDENT'S BRIEF ON THE MERITS

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BRIEF OF RESPONDENT CITY OF RIVERSIDE

I. STATEMENT OF THE CASE

A. The Parties

Plaintiff City of Riverside ("City") is a municipal corporation of the State of California.

Defendant Inland Empire Patient's Health and Wellness Center, Inc. ("Inland Empire"), is a nonprofit mutual benefit corporation that operates a medical marijuana dispensary within the City's limits. Inland Empire consists of medical marijuana patients who collectively cultivate medical marijuana and redistribute it to each other. (*City of Riverside v. Inland Empire Patient's Health and Wellness Center* (2011) 200 Cal.App.4th 885, 891[133 Cal. Rptr.3d 363] review granted Jan. 18, 2012, S198638 [*Inland Empire*].) Defendant Lanny Swerdlow is a registered nurse and manager of an adjacent, separate medical clinic, who has made referrals to Inland Empire's marijuana dispensary. Defendant Joseph Sump II is an Inland Empire board member and general manager of Inland Empire's marijuana dispensary. Defendants Meneleo Carlos and Filomena Carlos own the property upon which Inland Empire's marijuana dispensary is located, and lease the property to Swerdlow. Defendant Angel City West, Inc. provides management services for the property.

B. The City of Riverside's Zoning Code

The City has adopted a zoning code governing the permissible and

impermissible uses of land within the City's limits, which is codified in Chapter 19.150 of its Riverside Municipal Code ("RMC").[1] Section 19.150.020 of the zoning code, Table A, in addition to permitted uses, "identifies those uses that are specifically prohibited," and indicates that a medical marijuana dispensary constitutes a "Prohibited Use" throughout the City. (RMC, § 19.150.020, Table A.) The zoning code also states that "[a]ny use which is prohibited by state and/or federal law is also strictly prohibited." (RMC, § 19.150.020.) The zoning code states that "persons vested with enforcement authority ... shall have the power to ... use whatever judicial and administrative remedies are available under the Riverside Municipal Code" to enforce the zoning code. (RMC, § 19.070.020.)

The City's zoning code also provides that "any condition caused or permitted to exist in violation of any of the provisions of this Code, or the provisions of any code adopted by reference by this Code, shall be deemed

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[1] True and correct copies of the relevant portions of the RMC are contained in the Request for Judicial Notice, filed concurrently with this brief. In the Court of Appeal proceeding, the City of Riverside filed a request for judicial notice ("RJN"), requesting that the court judicially notice the relevant legislative history materials. The Court of Appeal did not act on the City's RJN. For this Court's convenience, the City is submitting an RJN requesting that this Court judicially notice these and other legislative history materials. (See *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1172, fn. 5 [explaining court's inclination to grant requests for judicial notice of legislative history materials].) This brief will cite these legislative history materials in the RJN, and the exhibit number and page number where they can be found.

a public nuisance and may be abated by the City." (RMC, § 1.01.110E.) The code enumerates acts constituting nuisances, and states that "[i]t is unlawful and is hereby declared a nuisance for any person owning, leasing, occupying or having charge or possession of any property … in the City to maintain the property in such a manner that any of the following conditions are present: [] … [] Q. Any other violation of this code pursuant to section 1.10.110E." (RMC, § 6.15.020.) The City's zoning code also provides that "any violation of the City's Zoning or other Municipal Code is deemed a public nuisance, which can be abated by the City, including through a civil action." (1 CT 4.)

C. <u>The Proceedings Below</u>

The City filed a complaint against the defendants, alleging that Inland Empire is operating a marijuana dispensary that is a public nuisance and that the other defendants are also responsible for operation of the dispensary. (1 CT 5.) The City's complaint alleges two causes of action. The first cause of action alleges that the marijuana dispensary is a public nuisance under Civil Code sections 3479 et seq., including sections 3480, 3491 and 3494, and that the nuisance is subject to abatement under those provisions. The second cause of action alleges that the marijuana dispensary is a nuisance under RMC section 1.01.110, and is subject to abatement under that provision. (*Id.*) The complaint seeks a preliminary and permanent injunction to cease the operation of the dispensary.

The City moved for a preliminary injunction to prevent operation of the dispensary. The trial court, after hearing the City's motion, granted the motion and issued a preliminary injunction, determining *inter alia* that the City was likely to prevail on the merits. The defendants appealed from the issuance of the preliminary injunction.

On appeal, the Court of Appeal, Fourth Appellate District, affirmed the trial court's issuance of the preliminary injunction. (*Inland Empire, supra*, 200 Cal.App.4th 885.) The court held that the defendants' marijuana dispensary constitutes "a violation of Riverside's zoning code, such as the provision banning [medical marijuana dispensaries]," and "is a zoning violation, constituting a public nuisance which is amenable to abatement and injunctive relief." (*Inland Empire,* at p. 897.) The court concluded that the CUA and the MMPA do not preempt the City's zoning regulation, and thus that the City is likely to prevail on the merits. (*Id.* at pp. 898-907.)

The defendants filed a Petition for Review in the California Supreme Court, which this Court granted.

SUMMARY OF ARGUMENT

In adopting the Compassionate Use Act ("CUA"; Health & Saf. Code, § 11362.5) and the Medical Marijuana Program Act ("MMPA," Health & Saf. Code, § 11362.7), the Legislature provided that persons who engage in certain medical marijuana activities are not subject to criminal

liability under specified provisions of California law that impose such criminal liability. The CUA and the MMPA thus preempt, at most, the authority of local governments to criminalize conduct that the statutes expressly authorize.[2] The CUA and the MMPA do not, however, preempt the traditional authority of local governments under their police power to adopt zoning and land use ordinances defining certain activities as nuisances, at least to the extent that the ordinances do not criminalize conduct that is specifically authorized under these statutes. Thus, the CUA and the MMPA do not preempt local laws that, as in this case, prohibit the establishment of marijuana dispensaries on the ground that they are a nuisance subject to abatement under the civil laws. Neither the CUA nor the MMPA specifically authorizes the establishment of marijuana dispensaries, much less preempts, or evinces an intent to preempt, local

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[2]The CUA and MMPA do not, strictly speaking, "authorize" anything. As noted, they merely exempt certain conduct from identified state criminal statutes, which is not the same thing. Such exemptions from state criminal penalties do not, as a general rule, prohibit cities and counties from criminalizing the exempted conduct by local ordinance. (See *Nordyke v. King* (2002) 27 Cal.4th 875, 883-884; *People v. Commons* (1944) 64 Cal.App.2d Supp. 925, 929-039 ["neither law nor ordinance contains any provision in any way authorizing or declaring lawful the acts which are specified in any exception thereto. *As to such acts, the situation is simply that they are not prohibited by the enactment containing the exception.* Consequently, a prohibition of such excepted acts contained in the other enactment does not conflict with the enactment in which the exception appears"].) However, it is unnecessary to explore, in this case, whether local agencies may criminalize conduct specifically "authorized" by the CUA and MMPA, because as discussed in greater detail below, Riverside's ordinance does no such thing.

laws banning such dispensaries. Even under Petitioners' broadest construction, marijuana dispensaries are merely one mode of "collectively or cooperatively . . . cultivat[ing] marijuana for medical purposes"; nothing in the CUA or MMPA singles out this mode for special favor, or prohibits local agencies from civilly regulating the intensity of collective cultivation as a land use by prohibiting this particular practice.) The Legislature thus preserved the traditional authority of local governments to ban certain kinds of establishments, such as marijuana dispensaries, that are defined as a nuisance under local zoning and land use laws.

This conclusion is supported not only by the MMPA itself, but also by legislative amendments of the MMPA in 2010 and 2011. One amendment provides that local governments are not precluded from adopting ordinances that "further restrict" the "location or establishment" of marijuana dispensaries (Health & Saf. Code § 11362.768, subd. (f))[3], and the other amendment provides that local governments are not precluded from adopting ordinances that "regulate" the "location, operation, or establishment" of marijuana cooperatives and collectives. (*Id.* at § 11362.83). By authorizing local governments to "regulate" and "further restrict" not only the location and operation of marijuana dispensaries but also their "establishment," the amendments plainly authorize local

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[3]All statutory references are to the Health and Safety Code unless otherwise indicated.

governments to prohibit such dispensaries under their zoning and land use laws. The legislative history of the amendments reaffirms that the Legislature did not preempt, or intend to preempt, local authority to regulate and ban marijuana dispensaries.

The conclusion that the CUA and the MMPA do not preempt local laws banning marijuana dispensaries is supported by the general rules of preemption adopted by this Court. Under these general rules, state laws presumptively do not preempt local laws—particularly in areas traditionally regulated by local governments—in the absence of a reasonably clear expression of legislative intent. (*Action Apartment Assn. Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1242; *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1150.) Neither the CUA nor the MMPA contains any indication, clear or otherwise, of any legislative intent to preempt local laws banning medical marijuana dispensaries. On the contrary, the statutes, read in light of their language and legislative history, plainly evince a legislative intent to preserve the traditional authority of local governments to adopt zoning and land use laws regulating, and if appropriate banning, medical marijuana dispensaries.

Finally, to the extent there are any questions as to whether the CUA and MMPA somehow preempted local land use regulatory authority, they must be resolved against any interpretation that requires local entities to sanction medical marijuana facilities. This is because such an interpretation

necessarily runs afoul of the federal Controlled Substances Act ("CSA"; 21 U.S.C. § 801 et seq.) and would require the invalidation of the state provisions under the Supremacy Clause of the United States Constitution. The CSA expressly prohibits the distribution of marijuana, for medical or other purposes. (21 U.S.C. § 841, subd. (a)(1).) Thus, if the CUA and the MMPA were read to *require* local governments to allow marijuana dispensaries to operate, state and federal law would stand at loggerheads, with state law requiring of the City precisely what federal law prohibits. Indeed, the Petitioners frankly acknowledge that the CUA and the MMPA are in conflict with the CSA, but assert that the State of California has the right to reject Congress's policy on the subject of marijuana distribution. This is simply incorrect: Federal law is, as the United States Supreme Court has elaborated for over a century, part and parcel of state law. And because these state law provisions, interpreted as Petitioners urge, "create a positive conflict" with the CSA "so that the two cannot consistently stand together" (21 U.S.C. § 903), and constitute an obstacle to the accomplishment and execution of Congress's full purposes and objectives, federal preemption is the inevitable result. As a basic principle of statutory construction, this court will not construe a statute in a manner that renders it inconsistent with the federal constitution. The only way to avoid running afoul of the CSA and hence the Supremacy Clause, is to interpret the CUA and the MMPA as the California Legislature plainly intended them to be

construed, that is, as not preempting local governments from exercising their traditional authority to prohibit marijuana dispensaries under their zoning and land use laws.

ARGUMENT

II. THE CITY OF RIVERSIDE'S ORDINANCE PROHIBITING THE ESTABLISHMENT OF MEDICAL MARIJUANA DISPENSARIES IS NOT PREEMPTED BY STATE LAW.

A. Under General Principles Of Preemption, State Laws Presumptively Do Not Preempt Local Laws In Areas Traditionally Regulated By Local Governments, Such As Zoning And Land Use.

Under article XI, section 7 of the California Constitution, "[a] city or county may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with the general laws." A city or county is authorized under its police power to adopt regulations designed to "promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety." (*Chicago, B. & Q. R. Co. v. Illinois* (1906) 200 U.S. 561, 592.)

Under its police power, a city or county is authorized to adopt zoning and business licensing regulations, including regulations restricting the use of land. (Cal. Const., art. XI, § 7; *Big Creek Lumber Co.*, *supra*, 38 Cal.4th at p. 1151.) "[T]he power of cities and counties to zone land use in accordance with local conditions is well entrenched." (*Big Creek Lumber*,

at p. 1152, quoting *IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 89.) "[A] city's power to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state." (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 782.) The City of Riverside acted pursuant to its police power, as authorized under article XI, section 7 of the Constitution, in banning medical marijuana dispensaries within its limits.

This Court has repeatedly held that state laws presumptively do not preempt or displace local laws adopted pursuant to the police power, particularly local laws governing subjects and areas traditionally regulated by local governments, such as zoning and land use regulation. (*Big Creek Lumber, supra,* 38 Cal.4th at pp. 1149-1150; *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897; *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885.) "[W]hen local government regulates in an area over which it traditionally 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." (*Big Creek Lumber*, at p. 1149 [emphasis added]; see *Action Apartment, supra*, 41 Cal.4th at p. 1242.) "In enacting zoning ordinances, the municipality performs a legislative function, and every intendment is in favor of the validity of such ordinances." (*Big Creek Lumber*, at p. 1151, quoting

Lockard v. City of Los Angeles (1949) 33 Cal.2d 453, 460.)

The Legislature, "when enacting state zoning laws, has declared its 'intention to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters.'" (*Big Creek Lumber*, *supra*, 38 Cal.4th at p. 1151, quoting *DeVita v. County of Napa, supra*, 9 Cal.4th at p. 782, quoting Gov. Code, § 65800.)[4] Additionally, the Legislature has recognized that a city may, by legislative declaration, determine what activities or conditions constitute a nuisance. (Gov. Code, § 38771; see also *Amusing Sandwich, Inc. v. City of Palm Springs* (1985) 165 Cal.App.3d 1116, 1129.)

Local governments are traditionally responsible for regulating zoning, and their local zoning ordinances are presumed to be valid. (*Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 713.) "'The party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption.' [Citation.]" (*Action Apartment*, *supra*, 41 Cal.4th at p. 1242.)

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[4] Government Code section 65800 provides: "It is the purpose of this chapter [*i.e.*, Chapter 4, Zoning Regulations] to provide for the adoption and administration of zoning law, ordinances, rules and regulations by counties and cities, as well as to implement such general plan as may be in effect in any such county and city. Except as provided in Article 4 (commencing with Section 65910 [open space zoning ordinance] and in Section 65913.1 [zoning sufficient land for residential use] the Legislature declares that in enacting this chapter it is its intention to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters."

The Court has "identified three types of conflict that cause preemption: a conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." (*Action Apartment, supra,* 41 Cal.4th at p. 1242 [citations and internal quotation marks omitted]; *Sherwin-Williams, supra,* 4 Cal.4th at pp. 897-898.) "Implied preemption occurs when: (1) general law so completely covers the subject as to clearly indicate the matter is exclusively one of state concern; (2) general law partially covers the subject in terms clearly indicating a paramount state concern that will not tolerate further local action; or (3) general law partially covers the subject and the adverse effect of a local ordinance on transient citizens of the state outweighs the possible municipal benefit." (*Big Creek Lumber, supra*, 38 Cal.4th at pp. 1157-1158.) As one court has stated: "We are reluctant to invoke the doctrine of implied preemption. Since preemption depends upon legislative intent, such a situation necessarily begs the question of why, if preemption was legislatively intended, the Legislature did not simply say so, as the Legislature has done many times in many circumstances." (*Garcia v. Four Points Sheraton LAX* (2010) 188 Cal.App.4th 364, 374.)

As this brief will explain, the CUA and the MMPA do not "occupy the field" of regulation of medical marijuana dispensaries, and local laws prohibiting the establishment of such dispensaries do not "contradict" any

provision of the CUA or MMPA. Thus, the CUA and the MMPA do not preempt the City of Riverside's ordinance banning such dispensaries within its limits.

B. <u>The Compassionate Use Act And The Medical Marijuana Program Act Do Not Preempt The City Of Riverside's Zoning Regulation Banning Medical Marijuana Dispensaries.</u>

1. The CUA And The MMPA Provide Immunity From Criminal Liability For Violations Of Specified Provisions Of The Health And Safety Code.

Under sections 11357 and 11358, any person who possesses or cultivates marijuana in California is subject to criminal liability. In 1996, the voters of California approved Proposition 215, entitled the "Compassionate Use Act of 1996" ("CUA"), which provides that persons who possess or cultivate marijuana are immune from criminal liability under sections 11357 and 11358.[5] The CUA provides:

> Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a

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[5]The CUA's stated purposes are to (1) "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana . . . ."; (2) "ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction"; and (3) "encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical needs of marijuana." (§§ 11362.5, subd. (b)(1)(A), -(B), -(C).

> patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the medical purposes of the patient upon the written or oral recommendation or approval of a physician.

(§ 11362.5, subd. (d).) Thus, the CUA provides that persons who possess or cultivate marijuana as provided in the statute are not subject to criminal liability.

In 2003, the Legislature enacted the MMPA in order to clarify and implement the CUA. (§§ 11362.7 et seq.)[6] The MMPA provides that the State Department of Health Services shall establish a "voluntary program" for the issuance of identification cards to qualified patients and primary caregivers (§ 11362.71); establishes guidelines for defining a "qualified patient" and a "primary caregiver" (§ 11362.7); limits the amount of medical marijuana that can be used (§ 11362.77);[7] limits the areas where medical marijuana can be used (§ 11362.79); and precludes licensing

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[6]The MMPA's stated purposes are to "[c]larify the scope of the application of the [CUA] and facilitate the prompt identification of qualified patients and their designated primary caregivers in order to avoid unnecessary arrest and prosecution of these individuals and provide needed guidance to law enforcement officers"; "[p]romote uniform and consistent application of the act among the counties within the state . . ."; and "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." (Stats., 2003, ch. 875, § 1.) The MMPA is intended "to address additional issues that were not included within the [Compassionate Use Act], and that must be resolved in order to promote the fair and orderly implementation of the act." (*Id.*)

[7]In *People v. Kelly* (2010) 47 Cal.4th 1008, the Court held the limits were "unconstitutionally amendatory insofar as it limits an in-court CUA defense."

agencies and boards from imposing civil penalties or taking disciplinary action against persons who engage in conduct authorized under the MMPA (§ 11362.8). (*People v. Urziceanu* (2005) 132 Cal.App.4th 747, 783.)

More importantly, here, the MMPA expands the list of statutes imposing criminal liability to which persons whose conduct is authorized under the CUA have an affirmative defense.

First, section 11362.765 provides that a qualified patient who "transports or processes marijuana for his or her own personal medical use," and a designated caregiver who "transports, processes, administers, delivers, or gives away" marijuana for medical purposes, "shall not be subject, on that sole basis, to criminal liability under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570" of the Health and Safety Code.[8]

Second, section 11362.775 provides that qualified patients and designated caregivers "who associate within the State of California in order 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" the same provisions as section 11362.765.

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[8] As noted previously, sections 11357 and 11358 establish criminal liability for persons who possess or cultivate marijuana, respectively. Section 11359 establishes criminal liability for persons who possess marijuana for sale; section 11360 for persons who transport, sell, furnish, administer or give away marijuana; section 11366 for persons who open or maintain places for use of controlled substances; and section 11366.5 for persons who rent places for use of controlled substances. Section 11570 provides that a building or place where controlled substances are sold, served, stored, kept, manufactured or given away is a nuisance subject to abatement.

Thus, the MMPA provides that qualified patients and caregivers who may be subject to criminal liability under specified provisions of the Health and Safety Code for engaging in certain specified medical marijuana activities, are immune from criminal liability to the extent that such activities are the "sole basis" for their liability. The MMPA thus decriminalizes certain conduct that was criminalized prior to its enactment. As a Court of Appeal has stated, the MMPA "accords qualified patients, primary caregivers, and holders of valid identification cards, an affirmative defense to certain enumerated penal provisions that would otherwise apply to transporting, processing, administering, or giving away marijuana to qualified persons for medical use." (*City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1171.) As this Court has stated, the MMPA "immunizes from prosecution a range of conduct ancillary to the provision of medical marijuana to qualified patients." (*People v. Mentch* (2008) 45 Cal.4th 274, 290 [citation omitted].)

a. The CUA And The MMPA Do Not Preempt Local Laws Banning Marijuana Dispensaries

The CUA and the MMPA do not preempt local laws banning marijuana dispensaries, for two reasons. First, the CUA and the MMPA contain no language authorizing marijuana dispensaries and no language that might be construed as preempting local ordinances prohibiting such dispensaries. The provisions of the MMPA that decriminalize "collective[]

or cooperative[] . . . cultivat[ion]" of marijuana do not even mention storefront dispensaries, and certainly do not mandate tolerance of that particular method of operating a collective cultivation endeavor.

Under general principles of preemption, state law presumptively does not preempt local laws—particularly in areas traditionally regulated by local governments—in the absence of a clear expression of legislative intent. (*Action Apartment*, *supra,* 41 Cal.4th at p. 1242; *Sherwin-Williams*, *supra*, 4 Cal.4th at p. 897.) As the CUA and the MMPA do not specifically authorize marijuana dispensaries which are, even under Petitioners' theory, merely one of many methods of collectively cultivating marijuana), they cannot be construed as preempting local authority to ban them under either field preemption or "contradiction" preemption principles.[9].

With regard to field preemption, Health and Safety Code sections 11362.768 and 11362.83 expressly contemplate local regulation of marijuana-related land uses – which conclusively eliminates any suggestion of field preemption. (*Big Creek Lumber Co.*, *supra,* 38 Cal.4th at p. 1157). Further, even without this statutory assistance, ordinary field preemption principles would lead to the same result. The statutes do not "so completely cover[]" the subject as to clearly indicate that the matter is "exclusively one of state concern," or "partially cover[]" the subject so as

[9]The third type of preemption – "duplication" – is plainly not relevant here. (See *Baldwin v. County of Tehama* (1994) 31 Cal.App.4th 166, 179-180 [explaining duplication preemption].)

not to "tolerate further local action," or "partially cover[]" the subject sufficiently to "outweigh" the possible municipal benefit. (*Big Creek Lumber*, *supra*, 38 Cal.4th at pp. 1157-1158.)

Similarly, Riverside's ordinances do not "contradict" state law. "A local ordinance contradicts state law when it is inimical to or cannot be reconciled with state law." (*O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1068.) Under this branch of preemption jurisprudence, "a local ordinance is not impliedly preempted by conflict with state law unless it mandates what state law expressly forbids, or forbids what state law expressly mandates. That is because, when a local ordinance does not prohibit what the statute commands or command what it prohibits, the ordinance is not 'inimical to' the statute." (*Big Creek Lumber Co., supra*, 38 Cal.4th at p. 1161.) Absent any provision of the CUA or MMPA clearly authorizing (let alone "mandat[ing]") marijuana dispensaries, Riverside's ordinance banning such dispensaries cannot be held contradictory or inimical to state law. As the Court of Appeal properly concluded below, "[z]oning ordinances banning MMD's [medical marijuana dispensaries] are not inconsistent with the CUA and MMP. . . ." (*Inland Empire*, *supra*, 200 Cal.App.4th at p. 905.) Therefore, the statutes do not preempt the City's ordinance here.

Second, the CUA and the MMPA, to the extent that they limit local laws at all, would limit only local laws that criminalize conduct specifically

authorized under the statutes. The MMPA specifically provides that qualified patients and caregivers who engage in certain medical marijuana activities—such as transporting, processing and using marijuana for medical purposes and associating with marijuana collectives—shall not be subject on that "sole basis" to "criminal liability" and "state criminal sanctions" imposed under specified provisions of the Health and Safety Code. (§§ 11362.765, 11362.775.) At most, the MMPA might preempt local laws that imposed criminal liability for conduct authorized under the MMPA.[10] It does not, however, preempt local laws that provide for civil abatement remedies, such as civil actions to enjoin marijuana dispensaries on grounds that they are a nuisance under local laws.

Here, the City of Riverside's zoning ordinance provides that a marijuana dispensary is a nuisance subject to abatement under the civil laws (RMC, § 19.150.020; § 1.01.110.E.)[11], and the City's action seeks to

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[10]As noted above, even such limited preemption is hardly a foregone conclusion.

[11]Under California law, a nuisance is "[a]nything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . ." (Civ. Code, § 3479.) "A nuisance may be a public nuisance, a private nuisance, or both. [Citation.]" (*Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal.App.4th 334, 341.) "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." (Civ. Code, § 3480.) A "nuisance" is regarded as a "nuisance per se" if "a legislative body with appropriate jurisdiction, in the exercise of

enjoin Inland Empire's marijuana dispensary on the ground that it is a nuisance subject to abatement under the civil laws. The City does not seek to impose criminal liability or sanctions against any of the defendants. Thus, the City does not seek to criminalize conduct that is specifically authorized under the MMPA. Hence, the City's regulation is not preempted by the statute.

b. This Court Should Not Rewrite The MMPA To Satisfy Petitioners' Misreading Of The Statute

The Petitioners make a somewhat convoluted argument in asserting that the MMPA preempts the City's ordinance banning marijuana dispensaries. (App. Br. 9-12.) They argue that the MMPA provides an immunity from criminal liability for violations of certain provisions of the Health and Safety Code, one of which is section 11570, which defines a "nuisance" as a "building or place" where marijuana is sold, served, stored, kept, manufactured or given away. (§§ 11571, 11573; App. Br. 9-12.) They then argue that section 11570 provides only a "civil nuisance cause of action" (App. Br. 11), and, therefore, that the MMPA—in providing an immunity from "state criminal sanctions"—contains a "scrivener's error."

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the police power, expressly declares a particular object or substance, activity, or circumstances to be a nuisance." (*Beck Development Co. v. Southern Pacific Transp. Co.* (1996) 44 Cal.App.4th 1160, 1206.) Thus, a marijuana dispensary is a public nuisance per se under the City's regulations. "'Nuisances per se are so regarded because no proof is required, beyond the actual fact of their existence, to establish the nuisance.' [Citations.]" (*City of Costa Mesa v. Soffer* (1992) 11 Cal.App.4th 378, 382.)

(App. Br. 10). In other words, they argue that because the MMPA provides an immunity from "criminal" liability under certain statutes – one of which establishes a "civil" cause of action – the MMPA is wrongly written and should be construed as authorizing immunity from "civil" statutes as well.

The Petitioners' argument is a blatant attempt to have this Court re-write the MMPA in order to expand its preemptive reach. Because the MMPA expressly provides affirmative defenses only to "criminal liability" and "state criminal sanctions" (§§ 11362.765, 11362.775), the statute cannot properly be construed as providing an immunity from local civil laws, including local laws based on constitutional and statutory land use authority, and the statute cannot be judicially re-written to provide such immunity.

Contrary to the Petitioners' argument, the Legislature meant just what it said in writing the MMPA, and the statute does not contain a "scrivener's error." Under California law, a "public nuisance" may be a violation of either criminal law or civil law, and may be remedied by a criminal prosecution or by a civil abatement action, such as an action for an injunction. Specifically, Civil Code section 3491 provides that the remedies for preventing a public nuisance, as defined in Civil Code section 3479, are "[i]ndictment or information," "[a] civil action, or "[a]batement," (Civ. Code, § 3491), and "[t]he remedy by indictment or information is regulated by the Penal Code." (Civ. Code, § 3492.) Thus, under California

law, a public nuisance may violate either criminal law or civil law, and may be subject to prosecution under the former or abatement under the latter. As section 11570 provides that certain drug-related activities are a "nuisance," the statute presumably may be enforced in the same way that other nuisance statutes are enforced, that is, by either civil law action or a criminal law action.[12]

In any event, the Legislature clearly intended only to provide an affirmative defense to criminal liability for persons who might otherwise be subject to criminal liability under specified provisions of the Health and Safety Code, including section 11570, and the Legislature intended to provide an affirmative defense from criminal liability under section 11570 on the assumption that the provision might impose such criminal liability. As a Court of Appeal has stated, the Legislature intended to provide an "affirmative defense to certain enumerated penal provisions" for persons whose activity is authorized under the MMPA (*City of Claremont, supra*, 177 Cal.App.4th at p. 1171), which includes section 11570. Thus, it is relevant only that the Legislature intended to provide immunity from criminal liability under section 11570 on the assumption that such liability

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[12]Section 11570 provides that a "nuisance," as defined in the statute, may be "enjoined, abated, and *prevented*." (Emphasis added.) Because a nuisance may be "prevented" under section 11570, presumably it may be "prevented" either under the criminal laws or the civil laws, as in the case of "nuisances" defined under Civil Code section 3479. (Civ. Code, § 3491.)

might exist, and is not relevant whether the provision is ultimately construed by the courts as imposing such criminal liability. The Legislature's action was, thus, prophylactic rather than corrective. As the Legislature provided an immunity from criminal liability if such liability exists, the statute does not contain a "scrivener's error."[13]

In sum, the CUA and the MMPA establish a statewide policy of allowing qualified patients and caregivers to engage in certain medical

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[13]In *City of Lake Forest v. Evergreen Holistic Collective* (2012) 203 Cal.App.4th 1413, the court of appeal recently held that the City of Lake Forest's ordinance banning a marijuana dispensary was preempted by the CUA and the MMPA. The court reasoned that section 11362.775 preempts *all* local regulations that ban marijuana dispensaries on grounds that they are a "nuisance," because a "nuisance" under either Health and Safety Code section 11570 or Civil Code section 3479 can be abated in a civil action, usually by an injunction, and therefore section 11362.775 is not limited to immunizing persons from "criminal liability." (*Lake Forest*, *supra*, 203 Cal.App.4th at pp. 1429-1430, 1444-1449, petn. for review pending petn. filed April 10, 2012.) *Lake Forest* was, by its own acknowledgement, a substantial departure from the analysis articulated in the *Claremont* line of cases, which the *Lake Forest* court simply dismissed as "incomplete and unpersuasive." (*Id.* at p. 1454.)

Contrary to *Lake Forest*, and as explained in the text above, a "nuisance" as defined in Civil Code section 3479 can be abated in either a "civil action"—as an action for an injunction—or in a criminal action by an "indictment or information." (Civ. Code, § 3491.) Thus, section 11362.775, in providing that certain persons are not subject to "state criminal sanctions" under section 11570, precludes only criminal actions based on nuisance laws but not civil actions based on such laws. The *Lake Forest* court has effectively re-written section 11362.775—which expressly provides only that designated persons shall not be subject to "state criminal sanctions"—by stretching the provision to bar civil enforcement actions to enjoin marijuana dispensaries. Nothing in section 11362.775 mentions civil enforcement actions, or provides any basis for stretching the provision to include civil enforcement actions.

marijuana activities without fear of criminal prosecution, but not a statewide policy of preempting local authority to regulate and ban marijuana dispensaries. Indeed, the statutes do not specifically authorize marijuana dispensaries, and thus there is no basis for construing the statutes as preempting local authority to ban the dispensaries. In effect, the Legislature considered both the needs of persons for medical marijuana and the traditional authority of local governments to regulate zoning and land use under their police power, and struck the balance by authorizing persons to grow, possess and use medical marijuana but not intruding on local authority to regulate and ban marijuana dispensaries. If the Legislature had decided to strike the balance differently, by preempting local authority to regulate and ban the dispensaries, it would have spoken with clarity and forthrightness on the subject, because this would have been a significant impingement on local authority to regulate nuisances under their police power. Surely the Legislature would not have hidden its policy under a rock, waiting for the courts to discover it. Neither the CUA nor the MMPA contains any clear and forthright expression of legislative policy to preempt local authority to regulate and ban marijuana dispensaries. If the Legislature's balance between competing interests is to be changed, the Legislature is responsible for making the change, not the courts.

2. This Court's Decision In *Ross v. RagingWire Telecommunications, Inc.*, Supports The Conclusion That The CUA And The MMPA Do Not Preempt Local Laws Banning Marijuana Dispensaries.

The above conclusion concerning the limited preemptive effect of the CUA and the MMPA is demonstrated by this Court's decision in *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, which held that the CUA does not apply in the employment law context despite providing immunity from criminal liability for qualified patients and caregivers. There, an employer had discharged an employee on grounds that a drug test showed that the employee had used marijuana. The employee's physician had recommended pursuant to the CUA that the employee use marijuana to treat chronic pain. The employee brought an action against the employer under the California Fair Employment and Housing Act, alleging that the employer had failed to accommodate his disability. (*Ross*, *supra,* at pp. 924-925.)

This Court, affirming the Court of Appeal's decision, upheld the dismissal of the employee's claim. The Court held that the CUA does not apply in the context of employment law because "California's voters merely exempted medical users and their primary caregivers from criminal liability under two specifically designated state statutes," specifically sections 11357 and 11358 of the Health and Safety Code, which make it illegal to possess or cultivate marijuana, respectively. (*Ross*, *supra*, 42

Cal.4th at p. 926.) "California's voters," the Court stated, ". . .were free to view the possibility of beneficial medical use as a sufficient basis for exempting from criminal liability under state law patients whose physicians recommend the drug." (*Id.* at p. 927.) "The proponents of the Compassionate Use Act . . . consistently described the proposed measure to the voters as motivated by the desire to create a narrow exception to the criminal law." (*Id.* at p. 929.) The Court stated that the statute "can be given literal effect as negating any expectation that the immunity to criminal liability for possessing marijuana granted in the Compassionate Use Act gives medical users a *civilly enforceable right* to possess the drug at work or in custody." (*Id.* at p. 931 [emphasis added].)

Thus, *Ross* held that the CUA does not apply in the context of employment law because it merely provides immunity from criminal liability for persons whose conduct is authorized under the CUA. *Ross* supports the conclusion that the CUA—and the MMPA, which clarifies and implements the CUA[14]—do not preempt local regulations banning marijuana dispensaries, to the extent that the local regulations do not

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[14]*Ross*'s own discussion of the MMPA further bolsters this conclusion. *Ross* rejected the suggestion that enactment of the MMPA provided medical marijuana users with employment protections that the CUA itself did not – because the MMPA contained no express provisions to that effect, and "we do not believe that [the MMPA] can reasonably be understood as adopting such a requirement silently and without debate." (*Ross, supra*, 42 Cal.4th at p. 931.) The wisdom of this observation as applied to the MMPA's supposedly implicit preemption of local authority over marijuana-related land uses is obvious.

impose criminal liability.[15]

3. **The Court Of Appeal Decisions In *Claremont*, *Naulls* And *Hill* Support The Conclusion That The CUA And The MMPA Do Not Preempt Local Laws Banning Marijuana Dispensaries.**

The above conclusion is amply demonstrated by the appellate decisions in *City of Claremont, supra*, 177 Cal.App.4th 1153, *City of Corona v. Naulls* (2008) 166 Cal.App.4th 418, and *County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861. The *Claremont* decision is particularly probative here, because the court upheld a City of Claremont ordinance that, like the City of Riverside's ordinance, did not allow marijuana dispensaries.

In *Claremont*, the court held, first, that the CUA did not expressly preempt the city's ordinance, stating:

> The CUA does not expressly preempt the City's actions in this case. The operative provisions of the CUA do not address zoning or business licensing decisions. ... [] The CUA does not authorize the operation of a medical marijuana dispensary [citation], nor does it prohibit local governments from regulating such dispensaries. Rather, the CUA expressly

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[15]Similarly, in *Mentch, supra*, 45 Cal.4th 274, this Court "closely analyzed" the scope of criminal immunity provided in section 11362.765 (*Id.* at 290), and concluded that the statute affords criminal immunity for specific individuals under a narrow set of circumstances. The Court stated that "the immunities conveyed by section 11362.765 have three defining characteristics: (1) they each apply only to a specific group of people; (2) they each apply only to a specific range of conduct; and (3) they each apply only against a specific set of laws." (*Id.* at pp. 290-291.) As in *Ross*, *Mentch* stressed that the CUA and the MMPA provide an immunity from criminal liability for persons whose conduct is authorized under the statutes.

> states that it does not supersede laws that protect individual and public safety: "Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others . . . ." (§ 11362.5, subd. (b)(2).)

(*Claremont*, *supra*, 177 Cal.App.4th at pp. 1172-1173 [citation omitted].)

Next, the court held that the MMPA did not expressly preempt the City's ordinance, stating:

> The MMP does not expressly preempt the City's actions at issue here. The operative provisions of the MMP, like those in the CUA, provide limited criminal immunities under a narrow set of circumstances. The MMP provides criminal immunities against cultivation and possession for sale charges to specific groups of people and only for specific actions. [Citations.] It accords additional immunities to qualified patients, holders of valid identification cards, and primary caregivers who "collectively or cooperatively cultivate marijuana for medical purposes." [Citation.]

(*Id.* at p. 1175.) Finally, the court held that neither the CUA nor the MMPA impliedly preempted the city's ordinance, stating:

> Neither the CUA nor the MMP impliedly preempts the City's actions in this case. Neither statute addresses, much less completely covers, the areas of land use, zoning and business licensing. Neither statute imposes comprehensive regulation demonstrating that the availability of medical marijuana is a matter of "statewide concern," thereby preempting local zoning and business licensing laws. The statement of voter intent in the CUA, "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes" [citation], ... does not create a "broad right to use marijuana without hindrance or inconvenience" (*Ross* [*v. RagingWire Telecommunications, Inc.* (2008)], *supra*, 42 Cal.4th [920,] at p. 928), or to dispense marijuana without regard to local zoning and business licensing laws. [] Neither the CUA nor the MMP partially covers the subject of marijuana "'in such terms as

> to indicate clearly that a paramount state concern will not tolerate further or additional local action.'" [Citation.] ... [] Finally, neither the CUA nor the MMP provides partial coverage of a subject that "'is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit'" to the City. [Citation.] ... Neither the CUA nor the MMP compels the establishment of local regulations to accommodate medical marijuana dispensaries. The City's enforcement of its licensing and zoning laws and its temporary moratorium on medical marijuana dispensaries do not conflict with the CUA or the MMP.

(*Id.* at pp. 1175-1176.)

The Petitioners argue that *Claremont* was wrongly decided, because—although *Claremont* stated that "[m]edical marijuana dispensaries are not mentioned in the text or history of the MMP"—the MMPA, in section 11362.775 of the Health and Safety Code, "allow[s] for the proliferation of 'association[s]' and made the existence of them a central goal to meet its objectives . . . ." (App. Br. 36-37.) Section 11362.775, however "*does not cover dispensing or selling marijuana.*" (*People v. Joseph* (2012) 2012 Cal.App. LEXIS 437 * 17 [emphasis added].) Instead, section 11362.775 simply provides that qualified patients and their designated caregivers who "associate within the State of California in order 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 enumerated provisions of the Health and Safety Code. (§ 11362.775.) Accordingly, the MMPA provides an affirmative defense to

criminal liability for persons who associate to "collectively or cooperatively" "cultivate" medical marijuana, but does not authorize or even mention medical marijuana *dispensaries*, much less make them a "central goal" of the MMPA—and much less preclude local governments from regulating them under their constitutional land use authority.[16] Thus, *Claremont* properly held that the MMPA does not preempt local regulations banning marijuana dispensaries.[17]

In *Naulls*, the Court of Appeal upheld an order enjoining a marijuana dispensary that lacked a valid zoning designation. There, the City of

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[16]Even if, as Petitioners argue, "associations" operating retail-type storefront dispensaries are one mode of undertaking collective or cooperative marijuana cultivation, they are hardly the exclusive manner in which such cultivation may be undertaken. The prohibition of this one particular mode of operation (i.e., retail-type storefront dispensaries) is, in the final analysis, merely a conventional regulation of the intensity of marijuana-related land uses - which is a well established component of local planning and zoning. (See Gov. Code, §§ 65850, subd. (c)(2), 65302, subd. (a).)

[17]The Petitioners also argue that *Claremont* is inapposite because the court simply sustained the City of Claremont's "temporary moratorium" of marijuana dispensaries rather a "complete ban" on such dispensaries. (App. Br. 33.) Because the CUA and the MMPA do not address the subject of marijuana dispensaries, they do not preclude local governments from adopting moratoria, regardless of whether the moratoria are "temporary" or "permanent." Indeed, the distinction between a "temporary" moratorium and a "permanent" one is simply temporal, and the CUA and the MMPA contain no language suggesting a distinction between local laws based on temporal considerations. Moreover, Petitioners are incorrect that *Claremont* concerned only a "temporary moratorium." The *Claremont* court said, "The CUA accordingly did not expressly preempt the City's enactment of the moratorium *or enforcement of local zoning* and business licensing requirements." (*Claremont, supra*, 177 Cal.App.4th at p. 1175 [emphasis added].)

Corona had adopted an ordinance under which "medical marijuana dispensaries are expressly prohibited in commercial and office zones, and in industrial zones." (*Naulls, supra,* 166 Cal.App.4th at p. 432.) The court held that "where a particular use of land is not expressly enumerated in a city's municipal code as constituting a permissible use, it follows that such use is impermissible." (*Id.* at p. 433 [emphasis in decision].) The court concluded that the operator of the marijuana dispensary, "by failing to comply with the City's various procedural requirements, created a nuisance per se, subject to abatement in accordance with the City's municipal code." (*Id.*)[18]

In *Hill*, the Court of Appeal held that the CUA and MMPA did not preempt the County of Los Angeles' ordinance prohibiting marijuana distribution facilities within a 1000-foot radius of a public library. First, the court held that the Legislature, in passing the MMPA, did not "occupy the field" of regulation of such facilities, because the MMPA expressly authorizes local regulations that are "consistent" with the MMPA. (*Hill, supra*, 192 Cal.App.4th at p. 867.) Second, the court held that the County

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[18]The operator of the marijuana facility had obtained a business license under false pretenses by describing his business as a "miscellaneous retail establishment." When the City of Corona learned the true nature of the facility, it brought an action to enjoin the facility on grounds that the facility was in violation of the City's licensing and zoning regulations. The court of appeal affirmed the trial court's grant of a preliminary injunction, on the ground that the facility was a "nuisance per se" under the City's business and zoning regulations. (166 Cal.App.4th at p. 433.)

regulation was not "facially [in]consisten[t]" with the MMPA, because the MMPA did not preclude local governments from placing "any additional restrictions on the location of" marijuana distribution facilities beyond the limitation mentioned in section 11362.768, which precludes such facilities from being located within 600 feet from schools. (*Id.* at pp. 868-869.)[19]

Thus, the CUA and the MMPA plainly do not preempt the authority of local governments to regulate and ban medical marijuana dispensaries under their traditional zoning and land use laws.

C. <u>The Legislature's Recent Amendments Of The Medical Marijuana Program Act, Codified In Health And Safety Code Sections 11362.768 And 11362.83, Reaffirm That Local Regulations Restricting The Establishment Of Marijuana Dispensaries Are Not Preempted.</u>

1. Section 11362.768 Reaffirms That Local Prohibitions Of Marijuana Dispensaries Are Not Preempted.

a. Statutory Language

In 2010, the Legislature amended the MMPA by enacting section 11362.768, which limits the proximity of marijuana dispensaries to schools.

[19]The *Hill* court also rejected the defendants' argument that the County's ordinance was "inconsistent" with the CUA and the MMPA "as applied," because, the defendants argued, the ordinance made it "practically impossible for such [marijuana] dispensaries to exist anywhere in the unincorporated areas of the County." (*Hill*, *supra*, 192 Cal.App.4th at 869.) The court specifically did not consider whether the CUA and the MMPA preempted local regulations that "ban medical marijuana dispensaries completely," because the County "took no position" on that issue. (*Id.* at p. 869, fn. 6.) Instead, the court held that the "[d]efendants' evidence does not support their claim." (*Id.* at p. 869.)

The provision, which became effective on January 1, 2011, states:

> No medical marijuana cooperative, collective, dispensary, operator, establishment, or provider who possesses, cultivates, or distributes medical marijuana pursuant to this article shall be located within a 600-foot radius of a school.

(§ 11362.768.)[20]

Section 11362.768 contains a savings clause, subdivision (f), which makes clear that the MMPA does not preempt the City of Riverside's ordinance banning marijuana dispensaries. Subdivision (f) provides:

> Nothing in this section shall prohibit a city, county, or city and county from adopting ordinances or policies that further *restrict* the location or *establishment* of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider.

(§ 11362.768, subd. (f) [emphasis added].) Subdivision (f)—by authorizing local governments to "further restrict" not only the "location" of marijuana dispensaries but also their "establishment"—plainly authorizes local

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[20]Section 11362.768 applies "only to a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider that is authorized by law to possess, cultivate, or distribute medical marijuana and that has a storefront or mobile retail outlet which ordinarily requires a local business license" (§ 11362.768, subd. (e)), and does not apply to "a licensed residential medical or elder care facility." (§ 11362.768, subd. (d).) In adopting the provision, the Legislature made a finding that "establishing a uniform standard regulating the proximity of medical marijuana cooperatives, collectives, dispensaries, operators, establishments, or providers to schools is a matter of statewide concern and not a municipal affair, as that term is used in Section 5 of Article XI of the California Constitution. Therefore, this act shall apply to all cities and counties, including charter cities and charter counties." (Assem. Bill No. 2650 (2009-2010 Reg. Sess.) § 2, Request for Judicial Notice, Exh. B.)

governments to prohibit their "establishment" altogether. A "further restrict[ion]" of the "establishment" of a marijuana dispensary can include not only limits on its operation but also a prohibition of its operation altogether. Nothing in the statute limits the authority of local governments to "further restrict" the "establishment" of marijuana dispensaries. By not imposing such limits, subdivision (f) plainly authorizes local governments to prohibit the establishment of marijuana dispensaries.

Even if subdivision (f) is not construed as affirmatively *authorizing* local governments to regulate and ban medical marijuana dispensaries, subdivision (f) plainly evinces no intent to *preempt* the traditional authority of local governments to regulate and ban such dispensaries. The absence of legislative authorization for local regulation does not mean or imply the existence of legislative preemption of such regulation, particularly in an area traditionally regulated by local governments. As this Court has stated, "'absent a clear indication of preemptive intent from the Legislature,' we presume that local regulation 'in an area over which [the local government] traditionally has exercised control' is not preempted by state law. [Citation.]" (*Action Apartment*, *supra*, 41 Cal.4th at p. 1242.) Thus, subdivision (f) authorizes and in any event does not preempt local regulations prohibiting the establishment of marijuana dispensaries.

Section 11362.768 contains another subdivision, subdivision (g), that also demonstrates that the MMPA does not preempt the City of

Riverside's ordinance. Subdivision (g) provides:

> Nothing in this section shall preempt local ordinances, adopted prior to January 1, 2011, that regulate the location or establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider.

(§ 11362.768, subd. (g).) Thus, subdivision (g) validates local regulations relating to the "establishment" of marijuana dispensaries prior to the statute's effective date of January 1, 2011. As the City of Riverside's ordinance was adopted prior to that date, the City's ordinance is also valid under Section 11362.768.

In sum, the savings clauses contained in subdivisions (f) and (g) of section 11362.768 plainly authorize local governments to ban marijuana dispensaries within their areas of jurisdiction—and to continue in effect any bans adopted prior to enactment of the savings clauses—and in any event do not preempt local authority to ban such dispensaries. As a Court of Appeal recently stated: "If there was ever any doubt about the Legislature's intention to allow local governments to regulate marijuana dispensaries, and we do not believe there was, the newly enacted section 11362.768, has made clear that local governments may regulate dispensaries." (*Hill*, *supra*, 192 Cal.App.4th at p. 868.) As this Court has stated, "[p]reemption by implication of legislative intent may not be found when the Legislature has expressed its intent to permit local regulations. Similarly, it should not be found when the statutory scheme recognizes

local regulations." (*People v. County of Mendocino* (1984) 36 Cal.3d 476, 485; see *IT Corp. v. Solano County Board of Supervisors* (1991) 1 Cal.4th 81, 94 [same].) Therefore, the City of Riverside's ordinance is valid under the savings clauses.

b. **Legislative History**

The legislative history of section 11362.768 further demonstrates that the MMPA authorizes, and in any event does not preempt, local regulations banning marijuana dispensaries.

A.B. 2650, the bill that was enacted into law, originally did not address the subject of local regulation of marijuana dispensaries.[21] During the legislative process, concerns were expressed that the bill might unduly restrict the traditional police power authority of local governments. The Assembly Committee on Public Safety report stated that since the passage of the MMPA in 2003, "much of the medical marijuana regulation has been determined by local jurisdictions better equipped to resolve issues related to the unique nature of its city or county."[22] In response, the bill's author stated that the bill's preemptive effect was limited, because the bill was intended to "provide[] local jurisdictions necessary guidance while

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[21]Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as introduced Feb. 19, 2010, RJN, Exh. F.
[22]Assem. Com. on Pub. Safety, Analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Apr. 8, 2010, p. 5, RJN, Exh. C.

allowing them to construct a more restrictive ordinance."[23] The author then incorporated this intent into the two savings clauses, subsections (f) and (g), and these savings clauses were included in the bill enacted into law.[24] According to the legislative reports, these savings clauses allow a local government "to construct a more restrictive ordinance" at any time, but "set[ting] a January 1, 2011 deadline for adopting any local ordinance that is less restrictive than AB 2650."[25] Thus, a local government can at any time adopt a *more* restrictive ordinance than provided in the statute, but cannot adopt a *less* restrictive ordinance after the January 1, 2011 deadline.[26]

The author of A.B. 2650, describing the current status of local

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[23]Assem. Com. on Appropriations, Analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Apr. 15, 2010, p. 1, RJN, Exh. E.
[24]Assem. Bill No. 2650 (2009-2010 Reg. Sess.), RJN, Exh. B.
[25]Sen. Local Gov. Com., Analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Jun. 10, 2010, p. 3, RJN, Exh. H.
[26]The Assembly Committee on Public Safety report also quoted the comment of an opponent of the bill, the Americans for Safe Access, which stated:

> Furthermore, local land use decisions are best made by City Councils and County Boards of Supervisors based on the individual circumstances in the Community. Usurping this local authority with an arbitrary statewide limit will interfere with the ability of local governments to use their discretion in developing the kinds of regulations that are already proven to protect legal patients and the community at large. Land use issues related to these associations should continue to be made at the local level—just like those for other legal businesses or organizations.

(Assem. Com. on Pub. Saf., Analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Apr. 15, 2010, p. 7, RJN, Exh. D.)

regulation of marijuana dispensaries, stated:

> Several cities in our district ... have recently passed ordinances to move, restrict or *ban marijuana dispensaries* [ ] within their city limits ... Currently, there is no guidance as the most appropriate locations for these dispensaries to open. As a result, we have cases of dispensaries opening up close to schools and other places where children congregate.[27]

Thus, the Legislature, in enacting the savings clauses, was fully aware that local governments had, in some instances, "ban[ned] marijuana dispensaries" within their limits, but nonetheless did not preempt local ordinances that imposed such bans. Instead, the Legislature authorized local governments to "further restrict" the "location or establishment" of marijuana dispensaries, even to the point of adopting a "more restrictive ordinance" than the statute. This legislative history makes clear that section 11362.768 authorizes, and in any event does not preempt, local regulations banning marijuana dispensaries.

In subsequent legislative reports, the Legislature expressed its concern with limiting the traditional authority of local governments to regulate conduct and behavior under the police power. One legislative report stated:

> The police power is the authority of governments to regulate private behavior in the public interest, consistent with constitutional rights and procedures. The California

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[27]Assem. Com. on Pub. Safety, Analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Apr. 8, 2010, p. 2 [emphasis added], RJN, Exh. C.

> Constitution allows cities and counties "to make and enforce within [their] limits all local police, sanitary, and other ordinances and regulations not in conflict with the general laws." Zoning and use permits are examples of how local officials use their police powers to regulate land uses. [] Local voters elect county supervisors and city council members to make public policy in response to local needs. Local land use decisions that strike a delicate balance between protecting school children and ensuring that patients and caregivers can obtain medical marijuana are best made by city and county officials.[28]

Another legislative report stated:

> It can be argued that each local government entity, in comparison with the state, best understands the particular issues concerning medical marijuana that may arise in each city and county. A standard that is workable in a rural county could be very difficult to comply with in a very dense urban area such as San Francisco.[29]

These legislative reports contained no discussion suggesting that the MMPA preempts local authority to regulate and ban marijuana dispensaries, or that the MMPA should be amended to preempt such local authority. Instead, the legislative reports repeatedly stressed the breadth of the local governments' police power authority, and the importance of minimizing any state interference with such local authority. This legislative concern is reflected in the savings clauses of subdivisions (f) and (g) of section 11362.768, which authorize local authority to adopt more restrictive regulations. These legislative efforts to preserve local authority

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[28]Sen. Local Gov. Com., Analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Jun. 10, 2010, pp. 1, 3, RJN, Exh. H.
[29]Sen. Com. On Pub. Safety, Analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Jun. 10, 2010, p. 10, RJN Exh. I.

would have been pointless, and the savings clauses mere surplusage, if the MMPA had already preempted more restrictive local regulation of marijuana dispensaries. Section 11362.768 amply demonstrates that the MMPA, both before and after its amendment, does not intrude on the traditional authority of local governments under their police power to regulate and ban marijuana dispensaries.

2. Section 11362.83 Further Reaffirms That Local Prohibitions Of Marijuana Dispensaries Are Not Preempted.

a. Statutory Language

In 2011, the Legislature again amended the MMPA, by amending section 11362.83. As amended, it provides that "[n]othing in this article shall prevent a city or other local governing body from adopting and enforcing any ... (a) local ordinances that regulate the location, operation, or establishment of a medical marijuana cooperative or collective"; "(b) [t]he civil and criminal enforcement of local ordinances described in subdivision (a)"; or "(c) [e]nacting other laws consistent with this article." (§ 11362.83.)

Section 11362.83, by authorizing local governments to "regulate" the "establishment" of marijuana cooperatives or collectives, and by imposing no limits on their authority to do so, plainly authorizes local governments to prohibit marijuana dispensaries within their areas of jurisdiction. And, even assuming *arguendo* that section 11362.83 does not

affirmatively authorize such local prohibitions, the statute clearly does not preempt such local prohibitions. As stated earlier, the absence of legislative authorization is not the equivalent of legislative preemption, in the context of local authority to regulate conduct and activity under the police power.

Indeed, section 11362.83 specifically applies only to a "medical marijuana cooperative or collective," and notably does not mention a medical marijuana "dispensary," contrary to section 11362.768, which specifically authorizes local governments to "further restrict" not only a medical marijuana "cooperative" and "collective" but also a medical marijuana "dispensary." By not even mentioning a marijuana dispensary, section 11362.83 makes clear that local ordinances applicable to medical marijuana dispensaries are wholly unaffected by the statute, including the statute, the MMPA, that it amends.

b. Legislative History

The legislative history of section 11362.83 further demonstrates that the MMPA authorizes, and in any event does not preempt, local regulations prohibiting the establishment of marijuana dispensaries. The Assembly Committee on Public Safety report concerning A.B. 1300, the bill that was enacted into law, quoted the author's statement as follows:

> AB 1300 clarifies two important components of our state's medical marijuana laws. The bill clarifies provisions of the Medical Marijuana Program (MMP) Act of 2003 relating to

> the authority of local governments to enact ordinances affecting medical marijuana collectives or cooperatives. … [¶] … Under article XI, section 7 of the California Constitution, '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.' Yet some argue that the Proposition 215 of 1996 and the MMP constitute the parameters of medical marijuana cooperative or collective regulation and, therefore, preclude local governments from enforcing any additional requirements. In the wake of key court cases on point, this bill clarifies state law so that communities may adopt ordinances and enforce them without the instability and expense of lawsuits challenging legal issues that have already been resolved.[30]

"It is a generally accepted principle that in adopting legislation the Legislature is presumed to have had knowledge of existing domestic judicial decisions and to have enacted and amended statutes in the light of such decisions as have a direct bearing upon them." (*Buckley v. Chadwick* (1955) 45 Cal.2d 183, 200.) The report continued:

> *This provision of the bill is written to be consistent with our state constitution and three appellate court decisions:* (1) *City of Claremont v. Darrell Kruse*, which found that there is nothing in the text or history of Proposition 215 suggesting that the voters intended to mandate municipalities to allow medical marijuana dispensaries to operate within their jurisdictions, or to alter the fact that land use has historically been a function of local government under their grant of police power. (2) *City of Corona v. Ronald Naulls*, which found that a dispensary's failure to comply with the city's procedural requirements before opening and operating a medical marijuana dispensary could be prosecuted as a nuisance. (3) *County of Los Angeles v. Martin Hill*, which found that the MMP does not confer on qualified patients and their caregivers the unfettered right to cultivate or dispense

[30]Assem. Com. on Pub. Safety, Analysis of Assem. Bill No. 1300 (2011-2012 Reg. Sess.) as amended Mar. 31, 2011, p. 2, RJN, Exh. J.

> marijuana anywhere they choose, and that dispensaries are not similarly situated to pharmacies and, therefore, do not need to be treated equally under local zoning laws.[31]

Finally, on September 20, 2011, the Governor confirmed the above interpretation of Section 11362.83 (A.B. 1300) in his Veto Message for S.B. 847,[32] stating:

> I have already signed AB 1300 that gave cities and counties authority to regulate medical marijuana dispensaries – an authority I believe they already had. [¶] This bill [S.B. 847] goes in the opposite direction by preempting local control and prescribing the precise locations where dispensaries may not be located. Decisions of this kind are best made in cities and counties, not the State Capitol.[33]

It has long been held that the Governor is acting in a legislative capacity and not as an executive when he is engaged in considering bills which have passed both Houses of the Legislature and which are presented to him for disapproval or approval. (*Lukens v. Nye* (1909) 156 Cal. 498, 501. His statements are relevant legislative intent. (*People v. Tanner* (1979) 24 Cal.3d 514.)

Thus, the legislative history of section 11362.83 indicates that the Legislature expressly intended to follow and apply the appellate court

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[31]Assem. Com. on Pub. Safety, Analysis of Assem. Bill No. 1300 (2011-2012 Reg. Sess.) as amended Mar. 31, 2011, pp. 2-3, RJN, Exh. J.
[32]S.B. 847 proposed to amend section 11362.768 to provide a distance requirement between residential uses and a marijuana cooperative, collective, dispensary, operator, establishment, or provider.
[33]Governor's Veto Message to Sen. on Sen. Bill No. 847 (Sept. 20, 2011) <http://gov.ca.gov/docs/SB_0847_Veto_Message.pdf.> (RJN, Exh. K.)

decisions in *Claremont*, *Naulls* and *Hill*, which, as explained earlier, upheld the authority of local governments to regulate marijuana dispensaries, and—in *Claremont* and *Naulls*—to prohibit them altogether. Since the Legislature intended to follow and apply *Claremont*, *Naulls* and *Hill*, the statute cannot be construed as preempting the City of Riverside's ordinance here.

3. The Petitioners' Arguments Concerning The Legislative Amendments Are Misplaced.

The Petitioners argue that section 11362.83—by authorizing local governments to "regulate" the location, operation or establishment of marijuana cooperatives and collectives—does not authorize local governments to "prohibit" marijuana dispensaries, because the power to "regulate" does not include the power to "prohibit." (App. Br. 13-20.)

In support of their argument, the Petitioners cite two California cases, *Boyd v. Sierra Madre* (1919) 41 Cal.App. 520 ("*Boyd*") and *Young v. Dept. of Fish and Game* (1981) 124 Cal.App.3d 257 ("*Young*"). (App. Br. 13-14.) Neither case supports the Petitioners' argument. *Boyd, supra,* held that a city had the power to "forbid" a livery stable from being operated without a license, because "[f]or the purpose of *regulating* such operations, a city has the power to divide its territorial limits into a residence and a business district, and *prohibit* the obnoxious occupation within the former." (*Boyd*, 41 Cal.App. at p. 524 [emphasis added].) Thus, *Boyd, supra,* held

that the power to "regulate" includes the power to "forbid" or "prohibit" in the context of the city's nuisance laws. *Young, supra,* addressed the question whether the Legislature had delegated authority to a state agency to impose a "complete ban" on commercial collecting of reptiles and amphibians, and concluded that (1) the agency in fact had not imposed a "complete ban," and (2) "[e]ven assuming, *arguendo*, that the Commission had adopted a complete ban ..., it would have been within its delegated authority." (*Young*, 124 Cal.App.3d at p. 277.) Thus, *Young* held that the agency had not imposed a "complete ban" but would have had the power to do so under the statute. Neither *Boyd* nor *Young* is relevant here.

Contrary to the Petitioners' argument, there is no categorical distinction between the government's power to "regulate" and its power to "prohibit." "'[Every] regulation necessarily speaks as a prohibition.'" (*Metromedia, Inc. v. City of San Diego* (1980) 26 Cal.3d 848, 863-864, *overruled on other grounds in Metromedia, Inc. v. City of San Diego* (1981) 453 U.S. 490 and quoting *Goldblatt v. Hempstead* (1962) 369 U.S. 590, 592 [8 L. Ed. 2d 130, 133, 82 S. Ct. 987].) Whether the power to "regulate" includes the power to "prohibit" depends on the context in which the terms are used, and the interpretation of the statute in which they are found. (See *Metromedia, Inc.*, at pp. 863-864 ["The distinction between prohibition and regulation in this case is one of words and not substance. (Citation.)]".)

The context in which the word "regulate" is used in section 11362.83 plainly indicates that the Legislature did not intend to preempt local laws banning medical marijuana dispensaries, for several reasons. First, putting aside the fact that section 11362.83 does not mention medical marijuana "dispensaries," the provision is written in non-preemptive rather than preemptive form. The provision does not state that it limits the authority of local governments in any way. Instead, the provision states that "[n]othing in this article shall prevent" a local government from adopting ordinances that "regulate" the location, operation or *establishment* of a medical marijuana cooperative or collective. Since the provision does not "prevent" the authority of local governments to "regulate" marijuana cooperatives and collectives, the provision forecloses any argument that the regulatory authority of local governments is preempted—but pointedly does not preempt the authority of local governments to adopt additional regulations, such as regulations prohibiting marijuana dispensaries. Thus, section 11362.83 establishes a floor rather than a ceiling concerning local regulatory authority. Since the provision is written in non-preemptive form, it cannot properly be construed as preempting local authority to ban medical marijuana dispensaries. As this Court has stated, state law presumptively does not preempt local laws in areas traditionally regulated by local governments in the absence of "a clear indication of preemptive intent from the Legislature." (*Action Apartment*, *supra*, 41 Cal.4th at p.

1242.)

Second, section 11362.83 on its face states that local governments may regulate not only the "location" and "operation" of marijuana collectives and cooperatives, but also their "establishment." The authority to regulate the "establishment" of collectives and cooperatives includes the authority to prohibit their "establishment." Section 11362.768 includes other language authorizing local governments to regulate the "operation" of cooperatives and collectives. Therefore, the power to regulate their "establishment" necessarily includes more than the power to limit their "operation," and includes the power to prohibit their establishment in the first instance. The Petitioners' argument that local governments cannot prohibit marijuana dispensaries would read the word "establishment" out of the statute, by giving the word the same meaning as the word "operate," which is already in the statute.

Finally, and most importantly, section 11362.83—read in the context of the entire CUA and MMPA—makes clear that the provision does not preempt local ordinances that ban marijuana dispensaries. "'A statute must construed "in the context of the entire statutory system of which it is a part, in order to achieve harmony among the parts." [Citation.]'" (*People v. Hull* (1991) 1 Cal.4th 266, 272.) As this Court has stated, the primary focus of the CUA is to provide immunity from criminal liability for persons whose conduct is authorized under the statutes. (*Ross*, *supra*, 42 Cal.4th at

pp. 926-931.) Since the MMPA clarifies and implements the CUA, the MMPA expands the list of criminal statutes for which immunity is provided, but does not otherwise preempt local authority to regulate, and prohibit, the establishment of marijuana dispensaries. Thus, the CUA and the MMPA do not preempt local authority to prohibit marijuana dispensaries, as long as local regulations do not criminalize conduct that is authorized under the statutes. In addition, the CUA and the MMPA authorize local governments not only to "regulate" marijuana cooperatives and collectives, as expressly provided in section 11362.83, but also to "further restrict" the "establishment" of marijuana dispensaries, as expressly provided in the savings clause of subdivision (f) of section 11362.768. The authority of local governments to "further restrict" the "establishment" of marijuana dispensaries plainly indicates that local governments have authority to prohibit their establishment. Lastly, the legislative history of sections 11362.768 and 11362.83, described above, plainly indicates that the Legislature did not intend to preempt the traditional authority of local governments under their police power to prohibit the establishment of marijuana dispensaries, and to adopt zoning and land use ordinances to that effect.

4. Contrary To The Petitioners' Argument, This Court's Decision In *O'Connell v. City Of Stockton* Is Not Apposite Here.

The Petitioners argue that this Court's decision in *O'Connell v. City*

of Stockton, supra, supports the conclusion that the City of Riverside's ordinance is preempted here. (App. Br. 28-29, 36.) In *O'Connell*, this Court considered whether the California Uniform Controlled Substances Act ("UCSA")—which authorizes forfeiture of vehicles used for the commission of certain criminal acts, and establishes penalties for their commission—preempted a City of Stockton regulation that also provided for forfeiture of vehicles used to commit such acts and established penalties for their commission.

O'Connell is entirely inapposite here. *O'Connell* was a field preemption case, addressing the preemptive effect of the USCA on "the field of penalizing crimes involving controlled substances." (*O'Connell, supra*, 41 Cal.4th at p. 1071.) The first step in any field preemption analysis is to define the relevant field. (*California Grocers Assn. v. City of Los Angeles* (2011) 52 Cal.4th 177, 188; *People v. Orozco* (1968) 266 Cal.App.2d 507, 513.) As indicated above, *O'Connell* did so carefully, focusing its analysis on the "comprehensive nature of the UCSA in defining drug crimes and specifying penalties" and defining the preempted field accordingly. This case involves none of those things. The field in question here is the civil regulation of the "establishment" of marijuana dispensaries (which under Petitioners' theory are not criminal) - not punishment of drug crimes. Whatever the outer contours of the "field of penalizing crimes involving controlled substances" at issue in *O'Connell*, they do not

encompass non-criminal zoning provisions affecting medical marijuana-related land uses.[34]

Perhaps more importantly, *O'Connell* itself noted that even where a field is legitimately occupied by state law, the Legislature "can, of course, expressly authorize local entities to enact ordinances such as the one in this case that we conclude is preempted under existing law." (*O'Connell, supra*, 41 Cal.4th at p. 1076, fn. 4.) In this case, the Legislature has enacted precisely such an authorization, broadly affirming the power of cities and counties to adopt local ordinances that "regulate the . . . establishment" or marijuana-related land uses. (§ 11362.83. See also § 11362.768.) As noted above, this conclusively eliminates any suggestion of field preemption, and makes Petitioners' reliance on *O'Connell* wholly untenable.

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[34]Although the CUA and MMPA are physically located amidst the Health and Safety Code sections comprising the UCSA, they were adopted at different times, and serve plainly different purposes. The CUA and MMPA were not at issue (or even mentioned) in *O'Connell*, and there is absolutely no suggestion that medical marijuana-related matters were contemplated by that Court. Petitioners' reliance upon some of *O'Connell's* broad language regarding the UCSA's "comprehensive enactment of penalties for crimes involving controlled substances," and suggestion that this must overwhelm the field of medical marijuana regulation due simply to the physical placement of the CUA and MMPA provisions relative to the UCSA, is consequently specious. "Cases are not authority for propositions they do not consider." (*People v. Martinez* (2000) 22 Cal.4th 106, 118.)

III. THE COURT MUST CONSTRUE THE COMPASSIONATE USE ACT AND THE MEDICAL MARIJUANA PROGRAM ACT AS RETAINING MUNICIPAL POWER TO REGULATE LAND USE, INCLUDING THE POWER TO BAN DISPENSARIES, BECAUSE A CONTRARY INTERPRETATION WOULD CONFLICT WITH THE FEDERAL CONTROLLED SUBSTANCES ACT AND VIOLATE THE SUPREMACY CLAUSE

As noted, the plain text and legislative history of the CUA and MMPA, as well as this Court's repeated recognition that local authority over land use decisions must be presumed absent the Legislature's clear intention to displace it, make it clear that the statutes cannot be interpreted as preempting the power of municipalities to ban medical marijuana dispensaries within their borders. Yet to the extent there are any doubts as to whether the state provisions have somehow preempted local authority, they must be resolved against any interpretation that requires local entities to sanction medical marijuana facilities. This is because such an interpretation necessarily runs afoul of the federal CSA and would consequently require the invalidation of the state provisions under the Supremacy Clause of the United States Constitution.

A. This Court Must Avoid Any Interpretation Of The CUA And MMPA That Conflicts With The Federal Controlled Substances Act And Results In Invalidation Of The State Provisions Under The Supremacy Clause

It is axiomatic that in interpreting a statute, this Court will avoid any interpretation that may run afoul of the United States Constitution. (*People v. Davenport* (1985) 41 Cal.3d 247, 266 ["If [] questions about the

constitutional validity of the statute may be avoided by adopting an alternate construction which is consistent with the statutory language and purpose, it is [the court's] duty to adopt the alternate construction"]; *Sullivan v. Oracle Corp.* (2011) 51 Cal.4th 1191, 1201 [avoiding commerce clause issues because the Court "would not construe a statute in a manner that raised serious constitutional questions if the statute's language reasonably permitted any other construction"].)

The federal CSA, 21 U.S.C. § 801 et seq., "prohibits the manufacture and distribution of various drugs, including marijuana." (*United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483, 486.) "Whereas some other drugs can be dispensed and prescribed for medical use, see 21 U.S.C. § 829, the same is not true for marijuana. Indeed, for purposes of the Controlled Substances Act, marijuana has 'no currently accepted medical use' at all." (*Id.* at 491, quoting 21 U.S.C. § 812; see also *Gonzales v. Raich* (2005) 545 U.S. 1, 14 ["In enacting the CSA, Congress classified marijuana as a Schedule I drug. 21 U.S.C. § 812(c). . . . Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment. § 812(b)(1)"].)

As we discuss, if this Court concludes that the CUA and the MMPA require the City of Riverside to affirmatively permit medical marijuana dispensaries to operate within its borders, then the CSA preempts

California law. This is because a state law requiring municipalities to facilitate the sale of marijuana would plainly "'stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" and thus violate the Supremacy Clause. (*Geier v. American Honda Motor Co., Inc.* (2000) 529 U.S. 861, 899, quoting *Hines v. Davidowitz* (1941) 312 U.S. 52, 67.)

B. Petitioners' Concession That Interpreting State Provisions As Requiring Municipalities To Permit Dispensaries Necessarily Represents A Departure From Federal Law Makes It Clear That Such A Construction Violates The Supremacy Clause, Because Federal Law Is A Core Component Of State Law And A State May Not Part Ways With Federal Law Merely Because The State Disagrees With The Federal Law

Petitioners conclude their brief with this remarkable statement: "Our state's medical marijuana laws cannot be ignored by our state officials because they conflict with federal law. [Citations]." (App. Br. 39.) The City of Riverside's zoning ordinance must be set aside, in Petitioners' view, because California, through the CUA and the MMPA, "decided to part ways with the federal government's intolerance with marijuana use for medical treatment." (*Id.* at 5.)

Petitioners fundamentally misunderstand the relationship between state and federal law. To be sure, under principles of federalism, California is entirely free to "create a narrow exception to the [state's] criminal law," (*Ross*, *supra*, 42 Cal.4th at p. 929), or even to repeal its own criminalization

of marijuana entirely. As this Court stated in *Ross*: "Although California's voters had no power to change federal law, certainly they were free to disagree with Congress's assessment of marijuana, and they also were free to view the possibility of beneficial medical use as a sufficient basis for exempting from criminal liability under state law patients whose physicians recommend the drug." (*Id.* at p. 927.) It is one thing to repeal a state criminal prohibition, or to send a message, through state legislation, to Congress, to urge it to amend the federal marijuana laws. It is something else entirely to ask this Court to enforce "[o]ur state's medical marijuana laws" despite the fact that "they conflict with federal law." (App. Br. 39.)

A state does not have the option of declining to follow federal law because it disagrees with that law. Rather, federal law constitutes a core part of California's law, binding on state courts, state government officials, and municipal officials alike. Indeed, Petitioners' assertions fly in the face of over a century of the United States Supreme Court's unambiguous teachings. (See *Claflin v. Houseman* (1876) 93 U.S. 130, 136-137 ["The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. . . . [A state] is just as much bound to recognize [federal law] as operative within the State as it is to recognize the State laws. The two together form one system of jurisprudence, which constitutes the law of the land for the State"]; *Mondou v. New York, New Haven, & Hartford Railroad Co.* (1912) 223

U.S. 1, 57 ["When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of [the State] as if the act had emanated from its own legislature"]; *Howlett v. Rose* (1990) 496 U.S. 356, 367 ["[T]he Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws 'the supreme Law of the Land,' and charges state courts with a coordinate responsibility to enforce that law"].)[35]

As this Court has recently stated, "[t]he supremacy clause of the United States constitution establishes a constitutional choice-of-law rule, makes federal law paramount, and vests Congress with the power to preempt state law. [Citations.]" (*Viva! Internat. Voice For Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 935.) Petitioners plainly acknowledge that to the extent the CUA and the MMPA

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[35]As the legal scholar Henry Hart put it nearly sixty years ago: "The law which governs daily living in the United States is a single system of law: it speaks in relation to any particular question with only one ultimately-authoritative voice, however difficult it may be on occasion to discern in advance which of two or more conflicting voices really carries authority. . . . People repeatedly subjected, like Pavlov's dogs, to two or more inconsistent sets of directions, without means of resolving the inconsistencies, could not fail in the end to react as the dogs did. The society, collectively, would suffer a nervous breakdown." (Henry M. Hart, Jr., The Relations Between State and Federal Law (1954) 54 Colum. L.Rev. 489, 489; see also Nelson, Preemption (2000) 86 Va. L.Rev. 225, 246 ["[F]ederal statutes take effect automatically within each state and form part of the same body of jurisprudence as state statutes"].)

require the City of Riverside to permit medical marijuana dispensaries, this conflicts with federal law. This dooms any such interpretation under the Supremacy Clause.[36]

But even putting aside Petitioners' concession, as we discuss, it is clear that any interpretation of the CUA and MMPA that requires municipalities to permit medical marijuana dispensaries necessarily conflicts with, and stands as an obstacle to accomplishment of the purposes underlying, the federal CSA. Hence, any such interpretation runs afoul of the Supremacy Clause and must be rejected.

C. **The Preemption Provision Of The CSA, 21 U.S.C. § 903, Instructs Courts To Displace State Law When It Conflicts With Or Otherwise Poses An Obstacle To The Accomplishment Of The Full Purposes And Objectives Of The CSA.**

"There are four species of federal preemption: express, conflict, obstacle, and field." (*Viva! Internat., supra*, 41 Cal.4th at p. 935.) This case concerns conflict (also known as impossibility) and obstacle (also

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[36]The Fourth District Court of Appeal has incorrectly taken the view that a municipality must follow state law even when it conflicts with federal law. The court's fundamentally flawed premise is that the obligation to follow federal law is a form of conscription that violates principles of federalism. (See *City of Lake Forest v. Evergreen Holistic Collective* (Feb. 29, 2012, G043909) __Cal.App.4th__, fn. 12.) Not so. While the federal government may not commandeer state or local executive or legislative officials to pass legislation or actually enforce federal law (e.g., raid medical marijuana facilities), see *Printz v. United States* (1997) 521 U.S. 898, 929, state *courts* have an obligation to insist that all state and all local officials follow and obey federal law even, and especially, when state and federal law conflict.

known as frustration-of-purpose) preemption -- two categories which typically run together and are most frequently jointly classified under the heading "conflict preemption." (See *Id.* at p. 935, fn. 3 ["The categories of preemption are not rigidly distinct," quoting *Crosby v. National Foreign Trade Council* (2000) 530 U.S. 363, 372, fn. 6, internal quotations marks omitted].)[37]

Central to the analysis is section 903 of the CSA, the statute's preemption provision, which provides:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a

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[37]Both this Court and the United States Supreme Court have grouped conflict preemption (which asks whether "simultaneous compliance with both state and federal directives is impossible") and obstacle preemption (which asks whether the state law at issue "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'") together, as a single category. (*Viva! Internat.*, *supra*, 41 Cal.4th at p. 936; *Geier*, *supra*, 529 U.S. at p. 873 ["The Court has not previously driven a legal wedge, only a terminological one between 'conflicts' that prevent or frustrate the accomplishment of a federal objective and 'conflicts' that make it 'impossible' for private parties to comply with both state and federal law. Rather, it has said that both forms of conflicting state law are 'nullified' by the Supremacy Clause"]; *Crosby*, *supra*, 530 U.S. pp. 372-373 ["State law is naturally preempted to the extent of any conflict with a federal statute. We will find preemption where it is impossible for a private party to comply with both state and federal law . . . , and where 'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" internal citations omitted].)

> positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

(21 U.S.C. § 903.)

Congressional intent in this provision is clear from the plain meaning of the text: Congress wished to allow states to create their own criminal penalties for drug-related conduct that also violates the CSA, while at the same time forbidding states from enacting statutes that have the effect of undermining the CSA. The CSA serves, effectively, as a floor, which states are free to build upon and enhance, but not undermine, through legislation of its own. In the parlance of preemption, Congress in section 903 wished to disclaim field preemption and, at the same time, embrace conflict and obstacle preemption.[38]

This natural reading comports with the United States Supreme Court's approach in preemption cases. In *Buckman Co. v. Plaintiff's Legal Com.* (2001) 531 U.S. 341, 352, the Court rejected an argument that the existence of an express preemption clause in a federal statute precluded the full range of conflict and obstacle preemption analysis. "[T]hat contention must fail," the Court wrote, "in light of our conclusion last Term in [*Geier, supra*, 529 U.S. 861], that neither an express pre-emption provision nor a

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[38]See also *Mikos, On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime* (2009) 62 Vand. L.Rev. 1421, 1451 ("[A] positive conflict would seem to arise anytime a state engages in, requires, or facilitates conduct or inaction that violates the CSA.")

saving clause 'bar[s] the ordinary working of conflict pre-emption principles.'" (*Buckman, supra*, 531 U.S. at p. 352.) In *Geier*, for its part, the Court held that the existence of express preemption language and a saving clause in a statute "imposes no unusual, 'special burden' against pre-emption." (*Geier, supra*, 529 U.S. at p. 873.) Instead, the Court found it essential to consider both conflict and obstacle preemption in cases where the federal statute in question contains an express preemption provision and/or a saving clause. "Congress," the Court noted, "would not want either kind of conflict" (*ibid.*); "the Court has thus refused to read general 'saving' provisions to tolerate actual conflict both in cases involving impossibility, [citation], and in 'frustration-of-purpose' cases." (*Id.* at pp. 873-874.) In the absence of both types of preemption analysis, the Court noted, "state law could impose legal duties that would conflict directly with federal regulatory mandates." (*Id.* at p. 871.) Failure to apply the full run of ordinary preemption principles would also "engender legal uncertainty with its inevitable systemwide costs (e.g., conflicts, delay, and expense) as courts tried sensibly to distinguish among varieties of 'conflict' (which often shade, one into the other) when applying this complicated rule to the many federal statutes that contain some form of an express pre-emption provision, a saving provision, or as here, both." (*Id.* at p. 874; accord *Sprietsma v. Mercury Marine* (2002) 537 U.S. 51, 64 [applying conflict and obstacle preemption analysis when statute contains preemption clause and

saving statute]; *Williamson v. Mazda Motor of America, Inc.* (2011) __ U.S. __, 131 S.Ct. 1131, 1136 [same].)

Nonetheless, despite uniform authority from the United States Supreme Court, the Fourth District Court of Appeal has held that section 903 only embraces conflict or impossibility preemption, and forecloses any inquiry into obstacle or frustration-of-purpose preemption. (*County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 825 ["Because Congress provided that the CSA preempted only laws positively conflicting with the CSA so that the two sets of laws could not consistently stand together, and omitted any reference to an intent to preempt laws posing an obstacle to the CSA, we interpret title 21 United States Code section 903 as preempting only those state laws that positively conflict with the CSA so that simultaneous compliance with both sets of laws is impossible"].) Under this reading of section 903, preemption would potentially be inappropriate in this case because it is in theory possible for a private party to comply with both federal and state law: A person could choose not to open a medical marijuana dispensary and thus avoid the conflict between state authorization and federal prohibition.

As noted, the San Diego *NORML* court's reading of section 903 is flatly contrary to *Geier*, *Buckman* and *Sprietsma*. Moreover, it cannot be reconciled with the Supreme Court's subsequent decision in *Wyeth v. Levine* (2009) 555 U.S. 555. *Wyeth* addressed the preemptive effect of the

Federal Food, Drug & Cosmetic Act, which contained a saving clause similar to the one in this case. The saving clause in *Wyeth* stated that "a provision of state law would only be invalidated upon a direct and positive conflict with the" federal statute. (*Id.* at p. 567.) The Court did not conclude that "direct and positive conflict" language permitted only the application of conflict or impossibility preemption. To the contrary, it analyzed the state law thoroughly under principles of both conflict and obstacle preemption. (*Id.* at pp. 567-576.) It is necessary to do the same in this case. Indeed, in *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industries* (Or. 2010) 230 P.3d 518, 527-28, the Oregon Supreme Court, citing *Wyeth*, analyzed both conflict and obstacle preemption in a medical marijuana case, before concluding that obstacle preemption invalidated the state statute.

The CSA consequently preempts Petitioners' construction of the CUA and the MMPA, if requiring municipalities to host medical marijuana dispensaries either renders it "impossible for a private party to comply with both state and federal law" or "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" such that "the state law undermines the intended purpose and 'natural effect'" of the CSA. (*Crosby, supra*, 530 U.S. at pp. 372-373.)

D. State Law Requiring Municipalities To Permit Medical Marijuana Dispensaries Conflicts With The CSA Because It Stands As An Obstacle To The Accomplishment And Execution Of The Full Purposes And Objectives Of Congress

The CSA constitutes a "comprehensive regime to combat the international and interstate traffic in illicit drugs." (*Raich, supra*, 545 U.S. at p. 12.) Precisely because it seeks to be "comprehensive," and views drugs as something worthy of "combat," there is no room within the statutory scheme for the undermining state law commands Petitioners seek to impose. (*Ibid.*) The CSA's main objectives "were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances. Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels." (*Id.* at pp. 12-13, footnote omitted.) The result was a "closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess" marijuana and other Schedule I controlled substances. (*Id.* at p. 13.) Indeed, by classifying marijuana as a Schedule I drug, Congress concluded that it had no "accepted medical use" (*id.* at p. 14) -- a conclusion that, under the Supremacy Clause, is binding on California.

Given these broad purposes, the CSA, in the words of section 903, "cannot consistently stand together" with any state law that requires municipalities to permit medical marijuana dispensaries to operate. There is a "positive conflict" between state and federal law: The CSA expressly

forbids the distribution of marijuana, medical or otherwise (21 U.S.C. §§ 841 subd. (a)(1), subd. 844(a)), while the CUA and the MMPA require, in Petitioners' reading, that each municipality in California facilitate marijuana's very distribution by permitting dispensaries to operate. State law, as Petitioners urge this Court to view it, undermines the core purposes conquering marijuana's abuse and traffic via a closed regulatory system of federal law.[39] Obstacle preemption is the inevitable result. (See, e.g., *Gade, supra*, 505 U.S. at p. 105 ["'[a]ny state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause,'" quoting *Perez v. Campbell* (1971) 402 U.S. 637, 651-652).

Neither the United States Supreme Court, nor this Court, has addressed a case where a state law (as Petitioners contend) affirmatively requires subdivisions of the state to participate in and facilitate what the federal criminal law expressly forbids. Yet the Supreme Court has repeatedly found obstacle preemption in analogous situations where the state law in question was arguably less intrusive on the federal interest than the wholesale erosion of the federal interest that Petitioners urge here.

In *Barnett Bank of Marion County v. Nelson* (1996) 517 U.S. 25, 27, the unanimous Court considered "whether a federal statute that permits national banks to sell insurance in small towns pre-empts a state statute that

[39]State law must be evaluated for preemption purposes based not just on its purpose, but on its "'actual effect'" as well. (*Gade v. National Solid Wastes Management Assn.* (1992) 505 U.S. 88, 105.)

forbids them to do so." Just as in this case one could in theory comply with both federal and state law simultaneously by not opening a medical marijuana dispensary, so too in *Barnett Bank*, the Court noted, one could comply with both statutes by not selling insurance. (*Id.* at p. 31.) Nonetheless, the Court held, obstacle preemption easily covered the case. Because the Federal Statute authorizes national banks to engage in activities that the State Statute expressly forbids[,] the State's prohibition [of those activities] would seem to stan[d] as an obstacle to the accomplishment of one of the Federal Statute's purposes. . . ." (*Ibid.*)

Michigan Canners & Freezers Assn. v. Agricultural Marketing & Bargaining Bd. (1984) 467 U.S. 461, is similarly on point. The federal Agricultural Fair Practices Act prohibited food producers' associations from interfering with a particular producer's "freedom to choose whether to bring his products to market himself or to sell them through a producers' cooperative association." (*Id.* at p. 464.) State law, by contrast, permitted producers' associations, under certain conditions, to serve as the exclusive, binding bargaining agent for all producers of a particular commodity. (*Id.* at pp. 466-468.) To be sure, the unanimous Court noted, "this is not a case in which it is impossible for an individual to comply with both state and federal law." (*Id.* at p. 478, fn. 21). After all, while producers' associations could apply to serve as the exclusive bargaining agents, they did not have to; they could leave individual producers free to sell on their own, as

federal law required. (*Id.* at p. 478.) But that was not enough to overcome obstacle preemption. The trouble was, once again, that the state statute empowered "producers' associations to do precisely what the federal Act forbids them to do." (*Id.* at pp. 477-478.) As a result of this logical contradiction between federal and state law, state law had to step aside because it stood "'as an obstacle to the [] accomplishment and execution of the full purposes and objectives of Congress.'" (*Id.* at p. 478, quoting *Hines, supra*, 312 U.S. at p. 67.)

So too, here, State law, as Petitioners read it, logically contradicts federal law. It commandeers municipalities and requires them "to do precisely what the federal Act forbids", namely, permit medical marijuana dispensaries to operate, even though federal law does not recognize medical marijuana and prohibits the very distribution of marijuana that dispensaries are designed to facilitate. By requiring municipalities such as the City of Riverside to authorize these dispensaries, California is undermining the purposes and objectives of the CSA in precisely the same way that *Michigan* undermined the Agricultural Fair Practices Act in *Michigan Canners*. Indeed, requiring municipalities to permit medical marijuana dispensaries would affirmatively promote the use and potential proliferation of marijuana, the very thing the CSA wishes to prevent.

Nash v. Florida Industrial Com. (1967) 389 U.S. 235 further illustrates this principle. The National Labor Relations Act provided for the

National Labor Relations Board to conduct unfair labor practice proceedings. Florida law, meanwhile, barred those unemployed as a result of a labor dispute from receiving unemployment benefits. Although one could comply with both federal and state law by not filing a labor complaint, the Florida law was preempted, the Court held, because "it appears obvious to us that this financial burden which Florida imposes will impede resort to the Act and thwart congressional reliance on individual action. A national system for the implementation of the country's labor policies is not so dependent on state law. Florida should not be permitted to defeat or handicap a valid national objective. . . ." (*Id.* at p. 239.)

Again, that is the case here. California is not permitted to defeat or handicap a valid national objective a closed system for controlling and preventing the distribution of marijuana by requiring municipalities to have medical marijuana dispensaries that their zoning laws do not otherwise permit.

Drawing on *Barnett Bank* and *Michigan Canners*, the Oregon Supreme Court has embraced this obstacle preemption analysis. In so doing, it emphasized the distinction between state laws that exempt the use of medical marijuana from criminal liability and state laws that affirmatively authorize the use of medical marijuana. (*Emerald Steel, supra*, 230 P.3d at pp. 527-533.) A state is free to alter its criminal law as it sees fit, the court correctly noted, because Congress may not commandeer

state legislatures, forcing them to enact particular laws. (See *New York v. United States* (1992) 505 U.S. 144.) At the same time, the court wrote, if a state goes beyond creating a new affirmative defense or decriminalization, but also authorizes particular conduct, Congress has the authority to preempt that authorization in order to achieve a particular policy objective. (*Emerald Steel* at 230 P.3d at pp. 533-534; see also *New York v. United States, supra*, 505 U.S. at p. 168 [the view taken by state legislatures "can always be preempted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular"].) Drawing on this distinction, the Oregon Supreme Court held that employers need not accommodate medical marijuana use, even though state law requires it, because state law that in any way authorizes, as opposed to merely decriminalizes, marijuana use is preempted because it frustrates the purposes of the CSA.

In this case, requiring municipalities to permit medical marijuana dispensaries goes well beyond creating an exception to the State's criminal law: It affirmatively authorizes and facilitates the use of marijuana and so stands as an obstacle to achievement of Congress' clear and ambitious goals in the CSA. There is consequently a "positive conflict" between the CSA on the one hand and the CUA and MMPA on the other. To the extent

that the CUA and the MMPA require the City of Riverside to permit medical marijuana dispensaries, state and federal law "cannot consistently stand together." (21 U.S.C. § 903.)

The City submits that the only way to avoid a construction of the MMPA and CUA that is at odds with the Supremacy Clause of the federal Constitution is to construe it consistent with its plain language, legislative history and the longstanding deference to municipal control of land use – as allowing municipalities the ability to regulate, including ban, medical marijuana dispensaries.[40]

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[40]Indeed, Government Code section 37100 expressly recognizes federal supremacy over land use regulation.

CONCLUSION

This Court should affirm the decision of the court of appeal, which held that the Compassionate Use Act and the Medical Marijuana Program Act do not preempt the City of Riverside's zoning regulations prohibiting the establishment of medical marijuana dispensaries and therefore that the trial court's order granting the preliminary injunction was proper.

Dated: April 26, 2012

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CERTIFICATION OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I certify that the City of Riverside's Respondent's Brief, which was delivered to this Court via overnight delivery on April 26, 2012, contains 13,990 words as calculated by the word count function of the word processing program used to prepare the brief.

DATED: April 26, 2012

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PROOF OF SERVICE

At the time of service I was over 18 years of age and not a party to this action. My business address is 5 Park Plaza, Suite 1500, Irvine, California 92614. On April 26, 2012, I served the following document(s):

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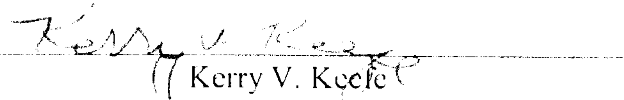
I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 26, 2012, at Irvine, California.



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