IN THE

SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF RIVERSIDE

Respondent,

vs.

INLAND EMPIRE PATIENT'S HEALTH AND WELLNESS CENTER, INC, WILLIAM JOSEPH SUMP II, LANNY DAVID SWERDLOW, ANGEL CITY WEST, INC., MENELEO CARLOS, AND FILOMENA CARLOS,

Appellants and Petitioners,

California Supreme Court,
No: S198638

Fourth District Ct. Appeal,
Div 2, No. E052400

Riverside County Superior Court Case
No. RIC10009872

After a Decision By the Court of Appeal,
4th Appellate District, Division Two

Honorable John D. Molloy, Judge
Superior Court, County of Riverside

APPELLANTS' REPLY BRIEF ON THE MERITS

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INTRODUCTION

"If the preemption doctrine means anything, it means that a local entity may not pass an ordinance, the effect of which is to completely frustrate a broad, evolutional statutory regime enacted by the Legislature." (emphasis added) *Fiscal v. City & Co. of San Francisco (2008) 158 Cal.App.4th 895, 911.* Many of respondent's arguments have already been addressed in the appellants/petitioners' opening brief on the merits. Appellants/Petitioners (hereinafter "appellant") responds only to those arguments which need further elucidation.

It is important to note what is not addressed by respondent. Respondent fails to discuss this court's preemption cases relied on by appellant (as well as a pair of court of appeal cases); or explain to this court why these cases are not applicable. (See, *Fiscal v. City & Co. of San Francisco (2008) 158 Cal.App.4th 895, N. Cal. Psychiatric Society v. City of Berkeley (1986) 178 Cal.App.3d 90, Great Western Shows v. County of Los Angeles (2002) 27 Cal.4th 853, 868, City of Torrance v. Transitional Living Centers (1982) 30 Cal.3d 516, 521, Cohen v. Board of Supervisors (1985) 40 Cal.3d 277, 293, California Grocers Assn. v. City of Los Angeles, (2011) 52 Cal. 4th 177, 190-191).* Respondent's failure to address these cases (at all[1]) reveals more about respondent's argument. Respondent advocates a radical departure from this court's established precedent on preemption; they seek to have this court set aside its jurisprudence on the issue of preemption (as it pertains to the ability of local governments to ban that which the state has made lawful) and carve out an exception for medical marijuana, forcing the state legislature to speak in the most clearest of words despite the intent to the contrary being obvious. No case before this court has ever set such a chaotic rule down and

[1] While respondent cites *California Grocers Assn. v. City of Los Angeles, (2011) 52 Cal. 4th 177* (RB 49), they do not discuss at all this court's discussion on preemption of local laws which seek to prohibit conduct authorized by the state and the application of *Cohen v. Board of Supervisors (1985) 40 Cal.3d 277.*

respondent fails to cite one case wherein that has occurred. Instead, respondent continues to meander around the brief arguing the legislature failed to say this or that and at the same time fail to note the obvious intent of the legislature. One could say that respondent did not find these cases applicable and thus chose to not waste time and address them; however, the more likely result of this silence is respondent's inability to construct an argument rebutting the applicability of said authorities. After all, appellants sought review on three grounds and number 3 was that this court's jurisprudence on preemption, specifically the cases cited supra, were in conflict with the court of appeal's published ruling. (See, Appellant's Petition for Review, Issues Presented) Despite the relevance and importance of those cases to the resolution of the preemption issue before this court, respondent chose silence.

Respondent additionally is incorrect *that Health and Safety Code section 11362.768 and 11362.83*[2] authorize municipalities to enact total bans of medical cannabis associations. Since the plain meaning of the words of those statutes ("regulate" and "restrict") do not support a total ban, respondent relies on legislative history material to buttress their argument. The legislative material respondent presents does not support that conclusion.

The legislative material submitted now by appellant, reveals that authorizing local governments to perpetually prohibit and ban medical cannabis associations formed pursuant to *section 11362.775* was not the intent of Assemblyman Blumenfield's bill. Assemblyman Blumenfield made this aspect of his bill clear at his July 5, 2011 presentation of the AB 1300 to the State Senate's Public Safety Committee. During exchanges with the Senate's Public Safety Committee Assemblyman Blumenfield emphatically stated that AB 1300 was not intended to

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

permit bans and was intended only to permit regulations. Assemblyman Blumenfield mentioned that the legality of local bans was an issue currently pending before the "Supreme Court" who would eventually decide the lawfulness of local prohibitions. The Senate's Public Safety Committee Chair (Senator Loni Hancock) then commented that she did not think bans were lawful nor possible in light of the *Compassionate Use Act* was supporting the bill because it is not intended to permit bans only regulations.

The written "BILL ANALYSIS" presented to the Senate's Public Safety Committee for the July 5, 2011 hearing states under section 1 entitled "Need for This Bill...According to the author" that the bill is intended only to regulate "delinquent" medical cannabis collectives "so that law abiding establishments may be left alone". [3]

This language (those made before the Senate Public Safety Committee and in the "BILL ANALYSIS" presented to the Senate's Public Safety Committee) unequivocally demonstrates the purpose of AB1300 was only to regulate and permit those institutions that abide by the regulations to thus exist; nothing in background and intent behind AB 1300 *(section 11362.83)* can be read as a green light to local authorities to eliminate medical marijuana collectives. Quite the contrary, in order to gain passage in the Senate's Public Safety Committee, AB 1300 was presented as not permitting bans

From the word "regulate" respondent is unable to construct a regime authorizing local governments to ban. This is why respondent fails to address a plethora of citations in appellant's opening brief which hold there is a difference between the word "regulate" and "prohibit". The Legislature chose the word

[3] http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1251-1300/ab_1300_cfa_20110705_094828_sen_comm.html. This Court is requested to take Judicial Notice of the Legislature's own web site and the Bill Analysis contained therein regarding AB 1300.

"regulate" (*Health and Safety Code sections 11362.83)* with much thought in mind; to communicate by the choosing of that word that they were permitting restrictions but did not intend to permit local governments to prohibit medical cannabis associations. That intent to not permit bans is clearly reflected in the author's (Assemblyman Blumenfield) written and oral presentation to the Senate's Public Safety Committee. The chair of the Senate's Public Safety Committee before voting on AB1300 voiced her understanding the bill would not provide local authority to ban medical marijuana collectives only to regulate them. Thus, neither the plain meaning of the text of AB1300 (*section 11362.83)* nor the legislative history, supports respondent's interpretation of *section 11362.83.* **(See, Appellant's Motion for Judicial Notice, Exhibit C, p.6-16 of transcript of Senate Public Safety Committee hearing July 5, 2011 , Exhibit E, "BILL ANALYSIS".)**

Finally, respondent attempts to raise arguments it never raised in the court of appeal. They raise for the first time ever (i.e., it was not even raised in the trial court), that California law is preempted by Federal law if it is not interpreted to give local municipalities the ability to ban medical marijuana collectives. That issue is waived before this court

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I

RESPONDENT'S ORDINANCE DOES NOT FIT WITHIN THE AREAS TRADITIONALLY REGULATED BY LOCAL GOVERNMENT. RESPONDENT'S ORDINANCE IS NOT A "REGULATION" REGARDING WHEN, WHERE, AND HOW THE CONDUCT CAN OCCUR BUT INSTEAD ITS A TOTAL PROHIBITION OF CONDUCT OTHERWISE LAWFUL UNDER STATE LAW. PROHIBITING CONDUCT OTHERWISE LAWFUL UNDER STATE LAW IS NOT SOMETHING LOCAL GOVERNMENTS HAVE TRADITIONALLY DONE.

Commencing at p.9 of respondent's brief (hereinafter referred to as "RB"), respondent argues that banning what is permitted under *Health and Safety Code section 11362.775* is somehow a "traditional" area of zoning regulation. Respondent presents their ordinance to this court as if it were an ordinance touching upon "zoning and business licensing regulations, including regulations restricting the use of land". (RB 9) Respondent repeatedly cites *Big Creek Lumber Co. v. County of Santa Cruz (2006), 38 Cal. 4th 1139* as support for this proposition. However, respondent fails to respond, at all, to appellants analysis of that case (see, appellant's brief on the merits at p,23-25, discussing *Big Creek Lumber Co. v. County of Santa Cruz (2006), 38 Cal. 4th 1139*). In *Big Creek Lumber Co* this Court explained the difference between a local ordinance which dictates WHERE certain activity permitted by state law must occur versus a total prohibition of conduct permitted by state law. The local ordinance at issue in *Big Creek Lumber Co* required certain logging operations to occur at specified locations within the county. However, key to this Court's decision was the finding that the ordinance did not ban logging

operations at all locations. *Id at 1160-1161.* Here, by contrast, respondent's ordinance does not simply seek to place conduct authorized by the *MMP* in selected areas, or even limited areas of the city; respondent's ordinance expressly bans what state law permits. Thus, this is not a situation wherein respondent's ordinance "may have the effect of placing some trees, at least temporarily, off limits to logging" (*Id*) instead it bans state authorized conduct all the time and into the future under all circumstances and without exception. This is not an attempt to enact local laws declaring where appellants institution should be located but an attempt to inject respondent's view whether the conduct already authorized by state law should occur at all and implementing that view within its municipal borders. Moreover, the "clear indication of preemptive intent" over land use regulations was not intended by this court to dispense with the rule of implied preemption and was not intended to apply to an ordinance enacting a total ban of conduct lawful under state law. *Big Creek Lumber Co* is a case dealing with ordinances fixing "locations" not a total ban. The litigant in that case even argued the local ordinance was a ban but the argument was rejected because logging could still occur at certain locations within the County of Santa Cruz. "Plaintiffs' overriding concern appears to be that localities may by locational zoning prohibit timber harvesting altogether. The ordinance before us does not have that effect, nor does it appear that any county has attempted such a result." *Id at 1060-1061.*

Respondent simply fails to grapple with a simple rule of law; i.e., local government may not prohibit what is permitted by state law (not even under the guise of land use regulation), they may only regulate the conduct. *Cohen v. Board of Supervisors (1985) 40 Cal.3d 277, at 293. Cohen* also held that "impos[ing] a sanction for engaging in" (*Cohen supra,* at 295) conduct otherwise authorized by state law is sufficient to render the local ordinance void; if you participate in the

conduct within the City of Riverside, respondent imposes a sanction in the form of lawsuits wherein injunctions, costs and attorney's fees are sought.

Respondent also avoids this court's recent analysis of its prior holding in *Cohen v. Board of Supervisors. California Grocers Assn. v. City of Los Angeles, (2011) 52 Cal. 4th 177*; there the court applied the holding in *Cohen, supra;* "The ordinance in actual effect did not enter the field of criminalizing sexual conduct, but only controlled who might operate an escort service, leaving the regulation of any such conduct to the state; as such, it was not preempted." *Id at 190-191.*

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

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II

SECTION 11362.775 PROVIDES IMMUNITY FROM A CIVIL CAUSE OF ACTION FOR NUISANCE UNDER SECTION 11570, AN ENFORCEMENT PROVISION WHICH IS STRICTLY CIVIL IN NATURE. RESPONDENT'S CLAIM THAT SECTION 11570 PERMITS ENFORCEMENT THROUGH CRIMINAL PROCEEDINGS IS WRONG AND CITE NOTHING IN SUPPORT. THE LEGISLATURE'S ENUMERATION WITHIN SECTION 11362.775 OF THE NUISANCE CAUSE OF ACTION UNDER SECTION 11570, INDICATES THE LEGISLATURE INTENDED TO PROHIBIT THE LABELING OF THESE INSTITUTIONS AS A NUISANCE AND ENJOIN THEM SIMPLY FOR DOING WHAT THE STATUTE PERMITS.

Respondent labels as "convoluted" (RB 20) appellant's argument (AB 9-12) regarding the intent behind language contained in *§ 11362.775*, which states "Qualified patients, ..., who associate within the State of California in order to collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, ***or 11570***."

Respondent makes two incorrect claims regarding this issue. First, respondent seizes upon the following quote in appellant's brief: "possible legislative scrivener's error" (AB 10). Respondent then fails to recognize footnote 3 of appellant's brief wherein appellant maintained "It is not a scriveners error" in that *§11570* is the last section enumerated in *§ 11362.775* and *§11570* is placed after the coma "," followed by the term "or" which singularly appears at this location of *§11362.775*. These details of *§ 11362.775*, thus; indicate the legislature's knowledge that *§11570* was civil in nature and elected to signal that obvious conclusion by

separating the criminal causes of action from the civil drug house abatement actions under *section 11570* with the coma followed by the word "or".

Secondly, respondent argues that *§11570* is somehow a criminal statute despite the evident and exclusive civil aspects of *§11570;* this section declares that every location which is used to sell controlled substances "is a nuisance, which shall be enjoined...and for which damages may be recovered". *(§11570)* Thus, respondent's claim that the word "prevent" in *§11570* indicates a nuisance may be "prevented" by a criminal action, is simply wrong. Any "prevent[ion]" permitted by *§11570* is limited to the remedies provided by Chapter 10, Article 3 of the Health and Safety Code ("Abatement"). The remedies therein provided are to allow local prosecutors or a county attorney to "maintain an action to abate and prevent...and to perpetually enjoin the person" *(§11571).* City attorneys have the same authority *(§11571.5).* The "action" is commenced by "verified" "complaint" *(§11572).* A trial court is permitted to also issue a "temporary restraining order or injunction to abate or prevent the continuance" of the nuisance *(§11573 subdivision (a))*; thus, the trial court may enjoin the conduct that leads to the nuisance even if it is not currently occurring. Section *11573.5* provides a complex civil procedure a court is to follow in issuing an injunction closing the premises prior to trial. Under *§11574* an undertaking is required by the applicant.

The most revealing statute indicating the exclusive civil nature of an "action" under *§11570* is *§11575*; that section *(§11575),* classifies an action under *§11570* as a civil cause of action, providing it has precedence in the trial court's calendar "except criminal proceedings" and a few other civil type of cases. The obvious import of *§11575* is demonstrating the legislature was not classifying a *§11570* cause of action as "criminal proceedings". *§11577* also permits "any other citizen" to be a "plaintiff"; a procedure not permitted in criminal prosecutions. *§11578* allows a court to tax costs against any citizen that brings the suit and did not

have grounds to do so, another procedure unheard of in criminal law. Finally, even the maximum monetary penalty of $25,000 is described as a "civil penalty" (*§11581 subdivision (b)(2)*).

The balance of *Article 3* of the *Uniformed Controlled Substance Act* (labeled "Abatement") lists a myriad of complex civil procedures which exclusively apply to civil actions brought under *§11570*. Absolutely nothing is "criminal" about *§11570;* it is strictly a civil cause of action which the legislature unequivocally excluded from the reach of local officials by enumerating that cause of action within *§11362.775* . The legislature's purpose for the inclusion of immunity from a section *§11570* cause of action was to avoid exactly what respondent seeks to accomplish; i.e., label a medical marijuana association a nuisance per se simply because the association is doing what the MMP permits (or in the words of *section 11362.775*, "solely on the basis of that fact").

Driving this point home, Section *11570* directly ties into other statutes which give municipalities the ability to declare "drug houses" a nuisance (*§§ 11571 §11571*.1 and *§11571.5)*. However, by enumerating *§11570* the legislature also intended to strip local governments of the ability to employ these ancillary weapons provided under *§§ 11571 §11571*.1 and *§11571.5*. The legislature was thus aware that local governments could not employ these statutes as a means of eliminating medical cannabis associations because the local authority to take such measures depends on the applicability of *§11570* to the conduct and the conduct was eliminated as a basis for a cause of action under *§11570*. The legislature eliminated the ability to enjoin a medical cannabis collective as a drug house nuisance by enumerating *§11570* and thus also eliminated local authority to declare medical cannabis collectives a "drug houses" nuisance under *§§ 11571, §11571*.1, *§11571.5*.

Local governments were thus prohibited from eliminating medical cannabis associations "solely on the basis of that fact" (see, *§ 11362.775)*.

Whether you accept respondent's argument that *§11570* is a criminal violation or appellant's position that it is strictly civil in nature, the only conclusion which is reasonable from the enumeration of *§11570* within *§11362.775* was the legislature did not want these institutions enjoined for doing nothing more than what the statute permits. The legislature's exclusion of *§11570* as a civil cause of action when it created *§11362.775* directly indicated the removal of local government's ability to label the activity a nuisance and ban it from its borders.

"[I]t has long been the rule in California that the literal language of enactments may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers." *Bell v. D.M.V. (1993) 11 Cal. App. 4th 304, 311* (holding that a statute which applied expressly only to "prosecutions" also applied to civil administrative hearings as intended by the legislature.) While this rule need not necessarily be invoked it may in this case as it is clear the legislature knew *§11570* as a civil cause of action and nothing more.

III

RESPONDENT'S ASSERTION THAT SECTION 11362.775 DOES NOT "COVER DISPENSING OR SELLING" IS WAIVED AS IT WAS NOT RAISED IN THE TRIAL COURT NOR IN THE COURT OF APPEAL. IF NOT WAIVED IT IS PREMISED ON PEOPLE V. JOSEPH; THAT CASE REACHES THAT RULING WITHOUT ANY ANALYSIS AT ALL. APPELLANT RELIES ON CASES WHICH HAVE REACHED A CONTRARY RULING AFTER MUCH ANALYSIS OF THE ISSUE.

Respondent argues at p.29 of their brief that *§11362.775* was not intended to permit collectives of the storefront variety and thus the court of appeal was correct in *City of Claremont v. Kruse (2009) 177 Cal.App.4th 1153* when they made the incorrect allegation that "Medical marijuana dispensaries are not mentioned in the text or history of the MMP". *City of Claremont at 1175.*

This issue has been waived as it was not raised in the trial court nor in the court of appeal. See, *City of National City v. Weiner (1993) 3 Cal.4th 832, 843, fn.6;* Also see, *Teter v. City of Newport Beach (2003) 30 Cal.4th 446, 450* ["As a matter of policy" this court will not entertain arguments which from a "fair reading of its brief" was not raised in the court of appeal.]

If the court elects to reach the merits of this portion of respondent's argument, appellant responds as follows. Perhaps the "text and history" were not written with the vernacular the *City of Claremont* panel was searching for, because the phrase "medical marijuana dispensary" is not mentioned anywhere in the *MMP*. Respondent makes the same allegation argues the word "dispensary" is nowhere in the text and history of the MMP, ignoring that the term chosen by the legislature was to "Enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." (Legislative Preamble, *2003 Cal SB 420 § 1; 2003 Cal ALS 875.*)

Despite respondent likely knowing that a "collective" is terminology used by the legislature to describe a store front operation which cultivates medical marijuana and distributes it back to its members, respondent chooses to call them "dispensaries" (a term which created by respondent and not the legislature). since that term is not used in the MMP, then "presto" respondent's trick goes un detected. It is through this error of labels that respondent maintains *City of Claremont v. Kruse (2009) 177 Cal.App.4th 1153* was correct when they made the incorrect allegation that "Medical marijuana dispensaries are not mentioned in the text or history of the *MMP*". *City of Claremont at 1175.* Medical cannabis associations such as appellants is clearly what the legislature was referring to when they sought to "enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects".

Respondent then employs the holding in *People ex rel. Trutanich v. Joseph, (2012)204 Cal.App.4th 1512* (hereafter *Joseph*) to support the claim that "dispensaries" are somehow different than a medical marijuana cultivation project such as appellant's wherein the medical cannabis is cultivated for the patient members and distributed back to them through a fixed location. The appellate court's opinion in *Joseph* turned on the summary unanalyzed conclusion that:

> "Section 11362.775 protects group activity "to cultivate marijuana for medical purposes." It does not cover dispensing or selling marijuana." *Joseph*[4] pg. 10

The *Joseph* court rendered this opinion in a two-sentence analysis creating a direct conflict with numerous court of appeal decision holding otherwise. The *Joseph* opinion most egregiously failed to discuss the uniform case law which had decided the issue differently. See, *People v. Urziceanu, 132 Cal. App. 4th 747, 785 (Cal. App. 3d Dist. 2005)* (holding *Health and Safety Code section 11362.775* permits the creation of collectives permitting sales of medical marijuana to its members in order to collect overhead costs and wages but not permitted to make a profit) and *People v. Hochanadel, 176 Cal. App. 4th 997, 1014 (2009)* (holding *Health and Safety Code section 11362.775* permits the creation of collectives of medical marijuana patients in the form of storefronts) or *County of Butte v. Superior Court, 175 Cal. App. 4th 729, 732-733 (2009)* (acknowledging that under *Health and Safety Code section 11362.775* collectives may sell to their members in order to collect overhead costs and wages).

The *Joseph* court's holding even conflicts with this courts understanding of the breadth of the immunity provided by *Health and Safety Code section*

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[4] All citations referring to *Joseph* are to the page numbers of the Slip Opinion.

11362.775. The two sentence ruling in *Joseph* directly conflicts with *People v. Kelly, 47 Cal. 4th 1008 (2010)* holding:

> [the] [t]wo sections [§§ 11362.765 and .775] afford immunity from criminal liability for various crimes—they parallel the immunity afforded by the CUA for possession and cultivation, and extend immunity for other related offenses, such as transportation of marijuana. (§§ 11362.765, 11362.775.)

People v. Kelly, 47 Cal. 4th 1008, 1015 fn. 5 (Cal. 2010);

> "the MMP provides, in sections 11362.765 and 11362.775, immunity from criminal liability for other crimes, in addition to the offenses of marijuana possession and cultivation."

People v. Kelly, (2010) 47 Cal. 4th 1008, 1017 fn. 9

Further, the *Joseph* court's conflict with the established case law is evident; in *People v. Urziceanu, (2005) 132 Cal. App. 4th 747* and its progeny, the court held as follows:

> "[*section 11362.775*] exempted those qualifying patients and primary caregivers who collectively or cooperatively cultivate marijuana for medical purposes from criminal sanctions for possession for sale, transportation or furnishing marijuana, maintaining a location for unlawfully selling, giving away, or using controlled substances, managing a location for the storage, distribution of any controlled substance for sale, and the laws declaring the use of property for these purposes a nuisance."

Urziceanu at *785*

The holding in *Urziceanu supra,* has been consistently followed and uniformly applied by other appellate courts in this state. See, *People v. Hochanadel, 176 Cal. App. 4th 997, 1014 (2009), County of Butte v. Superior Court, 175 Cal. App. 4th 729, 732-733 (2009), Qualified Patients Association v.*

City of Anaheim (2010) 187Cal.App.4th 734, 753-754, stating: "Particularly relevant to this appeal, the MMPA also added section 11362.775,...[t]his new law represents a dramatic change in the prohibitions on the use, distribution, and cultivation of marijuana for persons who are qualified patients or primary caregivers ... . Its specific itemization of the marijuana sales law indicates it contemplates the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the services provided in conjunction with the provision of that marijuana.").

Also see, *People v. Colvin, (2012) 203 Cal. App. 4th 1029, 1037.*

Joseph, now stands on its own legal island; creating a solitary view of the law on the subject apart from every other appellate court which has addressed and analyzed the issue; and they do so in a sweeping fashion, not referring to any analysis, not referring to the controlling case law and making this determination in a 2 sentence ruling; (compare to long analysis on the subject undertaken by the court of appeal in *People v. Colvin, (2012) 203 Cal. App. 4th 1029, 1037*).

In *People v. Birks (1998) 19 Cal.4th 108, 124-125,* this court found that prior case law which offered "little analysis" are inferior to those which "focused on the language" of the statute under dispute, "examined the history and purpose " of the contested statute and discussed the available case law on the subject. *Joseph* fails in all categories and should be discarded by this court.

On the issue of the breadth of the conduct permitted by *section 11362.775*, appellant instead relies on the lengthy analysis and reasoning of the court of appeal in *People v. Colvin, (2012) 203 Cal. App. 4th 1029, 1037*; *People v. Hochanadel, (2009)176 Cal. App. 4th 997, 1014* and *People v. Urziceanu, (2005) 132 Cal. App. 4th 747, 785*. It is clear from these decisions that appellant's conduct is authorized under *section 11362.775* and that the legislature used a different label than "dispensary" to describe these institutions.

Respondent's last defense of the holding in *City of Claremont v. Kruse* (*supra*) is claiming that the court did reach the issue of permitting local governments to enact bans (RB 30, fn.17). Respondent cites to language in *City of Claremont v. Kruse* which only refers to the "CUA" (Compassionate Use Act) and not the Medical Marijuana Program and merely states the "CUA" did not "expressly preempt" the city "enforcement of local zoning and business licensing requirements". The problem with respondent's claim is that language says nothing about prohibiting that which the state has made lawful and "enforcement of local zoning and business licensing requirements" has never been understood as banning conduct which state law permits. The first district court of appeals said it perfectly in reacting to an attempt to employ preemption case law which had not addressed total prohibition on conduct permitted by state law; "Neither case can be properly read to extend that limited preemption inquiry to a case such as this one involving a local government's attempt to enact an absolute and total ban...on all property, public and private, within its geographic jurisdiction." *Fiscal v. City and County of San Francisco (2008) 158 Cal. App. 4th 895, 918.*

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IV

RESPONDENT INCORRECTLY ARGUES THAT SINCE THE LEGISLATURE KNEW LOCAL GOVERNMENTS WERE BANNING MEDICAL CANNABIS ASSOCIATIONS WHEN THEY ENACTED SECTION 11362.768, THEIR FAILURE TO SAY OTHERWISE IS AN INDICATION THEY INTENDED TO ALLOW LOCAL BANS.

Respondent argues commencing at p.32 of their brief that since the legislature was aware of attempts to ban medical cannabis associations[5] (RB 38) and said nothing about it in enacting *section 11362.768*, then the legislature intended to allow local governments to continue to ban. This argument is made without any case law allowing for such an absurd rule in statutory construction (i.e., the legislature intends to allow everything they are possibly aware of but fail to prohibit through the enactment of a statute on a related issue). Nowhere in the legislative material submitted by respondent regarding AB2650 is there a single indication of a desire by the legislature to provide local authority to totally prohibit medical cannabis associations/collectives authorized under *section 11362.775*.

Neither does the plain language of *section 11362.768* support respondent's argument; the key words are "restrict[6] the location or establishment" (*subdivision (f)*). A similar phrasing is found in *subdivision (g)* of *section 11362.768* ("regulate the location or establishment"). Appellant has already argued the difference between the word "restrict" and the word "prohibit". (AB 13-16) Nothing in the key words of *section 11362.768* ("restrict" and "regulate") are synonymous with prohibiting and

[5] The mention of "bans" is almost a passing comment in the legislative material submitted by respondent (See, RB 38, fn.27) The intent behind the bill lies in the same material wherein the author pivots after this passing comment to explain the real issue and purpose of the bill; "Currently there is no guidance as the most appropriate locations for these dispensaries to open.", See Exhibit C, p.2 to respondent's request for judicial notice

[6] . The dictionary defenition of the word "restrict" is to "keep or confine within limits". *American Heritage Dictionary, 3rd Edition.* Not as respondent presses, to prohibit; in order to keep something confined within limits, limits have to exist for some conduct to be confined.

or banning the conduct. Yet, respondent's entire argument is written as if it was, claiming that *section 11362.768* "plainly authorizes local governments to ban" (RB35). The plain meaning of the contested phrases is that local restrictions r regulations regarding where medical marijuana collectives are to be located and regulations regarding requirements which must be met in order to be "establish[ed]", are permissible.

But respondent seeks to expand the plain meaning of the phrase "restrict the location or establishment" and or the phrase "regulate the location or establishment" contained in *section 11362.768 (f)* and (g) to include the ability to "ban" (RB 34-35). Respondent rests this entire argument on the incorrect premise that their ordinance arises out of a "traditional authority of local governments to regulate and ban such dispensaries" and that "banning such dispensaries" is an "area traditionally regulated by local governments". (RB 34) Respondent is incorrect and this court has never granted local government authority to ban lawful conduct (i.e., made lawful by state statute), from occurring within city borders. It is no different to attach a "zoning" label which prohibits the conduct from occurring ANYWHERE within the city's borders. Perhaps that is why respondent is unable to discuss this court's holding in *Cohen v. Board of Supervisors (1985) 40 Cal.3d 277, 293*, nor discuss this court's most recent explanation of the holding of that case *(California Grocers Assn. v. City of Los Angeles, (2011) 52 Cal. 4th 177, 190-191.*). Under this untenable logic pressed by respondent, absent the most explicit language from the legislature, local governments could ban any conduct authorized by state law by the contrivance of calling it a "zoning" regulation; such a result contradicts this court's holding in *Cohen v. Board of Supervisors (supra.)*.

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V

THE EXTRINSIC LEGISLATIVE INTENT MATERIAL REGARDING THE PASSAGE OF AB1300 INDICATE THE LEGISLATURE DID NOT INTEND TO HAVE SECTION 11362.83 USED AS A MEANS OF BANNING MEDICAL CANNABIS ASSOCIATIONS.

Respondent again figuratively leaps through the dictionary and argues "regulate" means "prohibit" and that the plain meaning of the word "regulate" in §11362.83 (as amended in 2011) also "authorizes local governments to prohibit marijuana dispensaries" (RB 40). Appellant has explained the limits of the word "regulate" (See AB 13-16); it does not encompass the ability to prohibit.

The legislative material submitted by appellant provides clear indication the legislature understood AB 1300 could not be employed to ban medical cannabis associations. And so does the material quoted by respondent (RB41-43).

The legislative material submitted now by appellant reveals that authorizing local governments to perpetually prohibit and ban medical cannabis associations formed pursuant to *section 11362.775* was not the intent of Assemblyman Blumenfield's bill, AB 1300. Assemblyman Blumenfield made this aspect of his bill clear at his July 5, 2011 presentation of the AB 1300 to the State Senate's Public Safety Committee. Opponents provided testimony and urged that an amendment be inserted making it clear that bans were not permitted by the AB 1300. Assemblyman Blumenfiled was then asked by the Committee Chair, Senator Loni Hancock, if the Assemblyman had any comments about the opponents concerns. Assemblyman Blumenfield emphatically stated that AB 1300 was not intended to permit bans, it was intended only to permit regulations. Assemblyman Blumenfield responded as follows: "this bill really is not intended on wading into the issue of bans...that's being right now heard by the supreme court, California

Supreme Court". After some further comment, Assemblyman Blumenfield added, with respect to the request for amendment to insert language stating bans were or were not allowed, "I am weary about getting into the issue of bans" "I just assume stay away from that issue and be very narrow in the scope of this bill". (Judicial Notice Motion, **Exhibit C**, p.14-15 Transcript Senate's Public Safety Committee.)

Senator Hancock , the told Assemblyman Blumenfield that since medical marijuana was approved by voter imitative, she did not "think a ban would be possible". Assemblyman Blumenfield responded that the legality of local bans was an issue currently being litigated in the courts; ("the court's are determining, there are localities that have put bans out there, the courts are determining whether that is..ah".) The Senate's Public Safety Committee Chair (Senator Loni Hancock) commented that "I don't think there can be an outright ban" and went on to announce her support for the bill as a means of regulating not prohibiting. (See, **Appellant's request for Judicial Notice of documents and audio pertaining to the Senate's Public Safety Committee on July 5, 2011, Exhibit A**, Audio Disc; **Exhibit B**, Letter from California Senator Bill Emmerson providing audio of July 5, 2011 Public Safety Committee hearing; **Exhibit C**, p.6-16 of Transcript of Senate's Public Safety Committee addressing AB 1300 on July 5, 2011; **Exhibit D** Declaration of Lanny Swerdlow as to authenticity of Exhibit A, audio of Senate's Public Safety Committee addressing AB 1300 on July 5, 2011; **Exhibit E**, "BILL ANALYSIS" for AB 1300 presented to the Senate's Public Safety Committee; **Exhibit F** Declaration of J. David Nick as to authenticity of Exhibit C and E)

The written "BILL ANALYSIS" for AB 1300 presented to the Senate's Public Safety Committee states under section 1 entitled: "Need for This Bill...According to the author", that the bill is intended only to regulate

"delinquent" medical cannabis collectives "so that law abiding establishments may be left alone". [7] (Exhibit E, p.6-7, Appellant's Request for Judicial Notice)

The intent of AB 1300 was thus to have "law abiding establishments...left alone" and not to allow a local prohibition on otherwise "law abiding establishments".

The "BILL ANALYSIS" also contained "The purposes of this bill" which "are to 1) specifically provide that a local government entity may enact an ordinance regulating the location, operation or establishment of a medical marijuana cooperative or collective; 2) authorize local government entity to enforce such ordinances through civil or criminal remedies and actions; and 3) authorize a local government entity to enact any ordinance that is consistent with the Medical Marijuana Program, which is intended to implement the Compassionate Use Act (medical marijuana initiative). (Exhibit E, p.2, Appellant's Request for Judicial Notice)

The problem AB 1300 targeted had nothing to do with the ability to ban and instead was couched in terms of needing the clear authority to enact basic regulations all businesses are routinely subject to. As a "Need for the Bill" Assemblyman Blumenfield stated:

> "Adding to the controversy, members of the growing medical marijuana industry have filed numerous legal challenges against local ordinances, often arguing that state laws are the only standard with which dispensaries must comply. If this claim were substantiated, communities would be

[7] This Court is requested to take Judicial Notice of the Legislature's own web site and the Bill Analysis contained therein regarding AB 1300. http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1251-1300/ab_1300_cfa_20110701_115748_sen_comm.html. Appellant separately submits the Bill Analysis of AB 1300 presented to the Senate Committee on Public Safety July 5, 2011, and asks the court take judicial notice.

virtually powerless in deciding dispensary concentration, location, crime mitigation, business licensure, taxation, and use permit conditions." [8]

The statements made before the Senate Public Safety Committee on July 5, 2011 and in the "BILL ANALYSIS" presented to the Senate's Public Safety Committee by its author, unequivocally demonstrates the purpose of AB1300 was only to regulate and permit those institutions that abide by the regulations to thus exist. Nothing in background and intent behind AB 1300 *(section 11362.83)* can be read as a green light to local authorities to eliminate medical marijuana collectives. Quite the contrary, in order to gain passage in the Senate's Public Safety Committee, AB 1300 was presented as not permitting bans.

The idea that a local government could totally prohibit medical cannabis collectives was clearly not contemplated in the passage of AB 1300. Because *section 11362.83* would still require all local laws to be "consistent" with the MMP, the "BILL ANALYSIS" even warned that common regulations that became too restrictive would remain unlawful. The "BILL ANALYSIS" additionally warned that "Any local ordinance adopted pursuant to this bill that overly restricts patients to organize a collective or cooperative could be found to violate the CUA." (See, Bill Analysis of AB 1300 presented to the Senate Committee on Public Safety July 5, 2011, Exhibit E, p.14-15, Appellant's Request for Judicial Notice

From the word "regulate" respondent is unable to construct a regime authorizing local governments to ban medical cannabis associations. This is why respondent fails to address a plethora of citations in appellant's opening brief (AB 13-16) which hold there is a difference between the word "regulate" and "prohibit". Respondent even mistakenly claims that "Petitioners cite two California cases";

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[8] See, Bill Analysis of AB 1300 presented to the Senate Committee on Public Safety July 5, 2011, Exhibit E, p.7, Appellant's Request for Judicial Notice

instead it was 3 California cases (AB 14) . The word "'regulate,"'..., has always been deemed to mean "'to fix"' or "'to establish,"' and no other signification may now properly be attached to that word in the connection in which it is so employed..." *Arnold v. Sullenger (1927) 200 Cal. 632, 635-636.* Respondent's criticism of *Boyd v. Sierra Madre, (1919) 41 Cal. App. 520, 524-525*, is not correct; the import of the case is that it was not a prohibition because the conduct could occur lawfully in some part of the town and under conditions set.

The Legislature chose the word "regulate" (*section 11362.83)* with much thought in mind. They evidently did so in order to communicate, by the choosing of that word ("regulate"), they were permitting restrictions but did not intend to permit local governments to prohibit medical cannabis associations or even enact restrictions which are not "consistent" with the MMP. [9]

The legislative intent to not permit bans is clearly reflected in the author's (Assemblyman Blumenfield) written and oral presentation to the Senate's Public Safety Committee. The chair of the Senate's Public Safety Committee before voting on AB1300 voiced her understanding the bill would not permit local authority to ban medical marijuana collectives only to regulate them. Thus, neither

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[9] Respondent's citation to *Metromedia, inc. v. City of San Diego (1980) 26 Cal.3d 848, 863-864* is not helpful; that case did not address a statewide statute as here with precise language and a claim of state law preemption. Instead the issue before the court was what the breadth of a city's police power was in a context wherein the legislature had not enacted any laws regarding the subject. The argument raised there was that a ban on outdoor billboard advertising was not a regulation but a prohibition. This Court's response was that it was not material because under the "current views of the police power" (*Id at 863*) a city may prohibit outdoor advertising; stating:

> "Surely the validity of the ordinance does not depend on the court's choice between such verbal formulas. Rather than strive to develop a logical distinction between "regulation" and "prohibition," and to find themselves embroiled in language rather than fact, courts of other jurisdictions in recent decisions have held that a community can entirely prohibit off-site advertising." (*Id at 864*)

the plain meaning of the text of AB1300 (*section 11362.83)*, nor the legislative history, support respondent's interpretation of *section 11362.83.*

Given the above history, even the legislative extrinsic material point relied on by respondent (RB41-43) supports this conclusion; nowhere in the legislative material cited by respondent is there an indication of a desire to give local government the authority to ban these institutions. Exhibit J to respondent's request for judicial notice lays down the problem the legislation was attempting to remedy; lawsuits wherein parties would argue **no** regulations could be imposed at all as the MMP "constitute the parameters of...regulation and therefore preclude local governments from enforcing any additional requirements". There are reference in the legislative material submitted by respondent to codifying the rulings in *City of Claremont v. Kruse (2009) 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.* In light of the complete absence of any indication in the legislative extrinsic material of a desire to permit bans, the citation to these cases in the legislative material is indicative the legislature understood those case in the same manner as appellant has argued. They only permit regulation; these appellate court rulings have never held that bans were permissible, despite the stretching by respondent of the issue before those courts. *City of Claremont v. Kruse's* moratorium could not even be enacted unless the conduct had been permitted already and there was a plan to issue permits in the future. See, *Government Code section 65858, subdivision (c)*, discussing the "approval of additional..., use permits, ...or any other applicable entitlement for use which is required in order to comply with a zoning ordinance..". "Neither case can be properly read to extend that limited preemption inquiry to a case such as this one involving a local government's attempt to enact an absolute and total ban...on all property, public and private, within its geographic jurisdiction." *Fiscal v. City and County of San Francisco (2008) 158 Cal. App. 4th 895, 918.*

VI

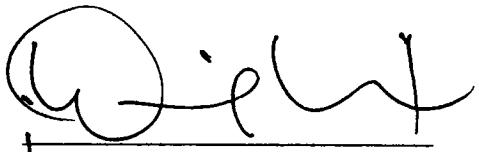
RESPONDENT'S ARGUMENT, THAT GIVING MUNICIPALITIES AUTHORITY TO BAN MEDICAL CANNABIS IS NECESSARY; OTHERWISE, THE MMP IS PREEMPTED BY THE FEDERAL CONTROLLED SUBSTANCE ACT, IS WAIVED AS IT WAS NOT RAISED IN THE TRIAL COURT NOR IN THE COURT OF APPEAL.

Respondent argues, for the first time in this litigation, that this court must interpret the MMP as they argue; otherwise, the MMP would be preempted by the Federal Controlled Substance Act (RB 51). This issue has been waived as it was not raised in the trial court nor in the court of appeal. See, *City of National City v. Weiner (1993) 3 Cal.4th 832, 843, fn.6;* Also see, *Teter v. City of Newport Beach (2003) 30 Cal.4th 446, 450* ["As a matter of policy" this court will not entertain arguments which from a "fair reading of its brief" were not raised in the court of appeal.]

CONCLUSION

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

Dated: May 31, 2012



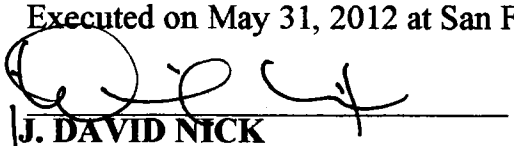
J. DAVID NICK
Attorney for Appellants/Petitioners

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

I J. David Nick certify that this brief contains 7,220 words pursuant to the Word program used to create this brief.

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

Executed on May 31, 2012 at San Francisco, California.



J. DAVID NICK

PROOF OF SERVICE

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

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

APPELLANTS'/PETITIONERS' REPLY BRIEF ON THE MERITS.

on parties named below, addressed as follows:

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

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

Executed on May 31, 2012 at San Francisco, California.

J. DAVID NICK