THOMAS C. HORNE
Attorney General
Firm Bar No. 14000

Kevin D. Ray, No. 007485
Lori S. Davis, No. 027875
Aubrey Joy Corcoran, No. 025423
Assistant Attorneys General
1275 West Washington Street
Phoenix, Arizona 85007-2926
Telephone: (602) 542-8328
Facsimile: (602) 364-0700
Email: EducationHealth@azag.gov

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

STATE OF ARIZONA, et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, et al.,

Defendants.

Case No. 11-CV-01072-PHX-SRB

PLAINTIFFS' SECOND MOTION TO SUPPLEMENT THE RECORD

(Honorable Susan R. Bolton)

COME NOW the Plaintiffs State of Arizona; Janice K. Brewer, Governor of the State of Arizona, in her Official Capacity; Will Humble, Director of Arizona Department of Health Services, in his Official Capacity; and Robert C. Halliday, Director of Arizona Department of Public Safety, in his Official Capacity (collectively "Plaintiffs"), through undersigned counsel, and hereby move to supplement the record to bring to this Court's attention recent activity with regard to medical marijuana. As these activities may impact the Court's determination of

the case at bar, including the pending motions to dismiss, the Plaintiffs move for permission to supplement the record with the following documents, attached hereto as exhibits:

A. Letter to Mayor Ann Schwab, City of Chico, California from Benjamin B. Wagner, United States Attorney for the Eastern District of California (July 1, 2011)

B. Letter to Robert S. Wall, Director of Community Development, City of Eureka, California from Melinda Haag, United States Attorney for the Northern District of California (August 15, 2011)

C. *Pack v. City of Long Beach*, --- Cal.Rptr.3d ----, 199 Cal.App.4th 1070 (Cal. Ct. App. October 4, 2011)

DATED this 21st day of November, 2011.

THOMAS C. HORNE
Attorney General

/s/ Lori S. Davis

Kevin D. Ray
Lori S. Davis
Aubrey Joy Corcoran
Assistant Attorneys General

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following, if CM/ECF registrants, and mailed a copy of same to any non-registrants, this 21st day of November, 2011 to:

Scott Risner, Esq.
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W.
Washington, D.C. 20001

Brian Bergin, Esq.
Rose Law Group
6613 N. Scottsdale Road, Suite 200
Scottsdale, AZ 85250

Lisa T. Hauser, Esq.
Gammage & Burnham
Two North Central, 15th Floor
Phoenix, AZ 85004

Thomas W. Dean, Esq.
Thomas W. Dean Esq. PLC
323 N Leroux Street, Suite 101
Flagstaff, AZ 86001

Ezekiel R. Edwards, Esq.
American Civil Liberties Union
1101 Pacific Avenue, Suite 333
Santa Cruz, CA 95060

Thomas P. Liddy, Esq.
Maricopa County Attorney's Office
222 North Central Avenue, Suite 1100
Phoenix, AZ 85004

By: /s/ Phil Londen
#2388245

INDEX OF EXHIBITS

A. Letter to Mayor Ann Schwab, City of Chico, California from Benjamin B. Wagner, United States Attorney for the Eastern District of California (July 1, 2011)

B. Letter to Robert S. Wall, Director of Community Development, City of Eureka, California from Melinda Haag, United States Attorney for the Northern District of California (August 15, 2011)

C. *Pack v. City of Long Beach*, --- Cal.Rptr.3d ----, 199 Cal.App.4th 1070 (Cal. Ct. App. October 4, 2011)

EXHIBIT A

U.S. DEPARTMENT OF JUSTICE

United States Attorney
Eastern District of California

Benjamin B. Wagner
United States Attorney

Robert T. Matsui
United States Courthouse
501 I Street, Suite 10-100
Sacramento, CA 95814

Phone 916/554-2700
Fax 916/554-2900
TTD 916/554-2855

July 1, 2011

Mayor Ann Schwab
City of Chico
PO Box 3420
Chico, CA 95927

Dear Mayor Schwab:

It has come to my attention that the City of Chico is considering an ordinance which would authorize permits for two medical marijuana cultivation facilities, each up to 10,000 square feet. This letter is written to ensure there is no confusion regarding the U.S. Department of Justice's position regarding municipal ordinances and state laws that purport to establish proposed marijuana cultivation or licensing programs.

Congress has determined that marijuana is a controlled substance. Congress placed marijuana in Schedule I of the Controlled Substances Act (CSA) and, as such, growing, distributing, and possessing marijuana in any capacity, other than as part of a federally authorized research program, is a violation of federal law regardless of state laws permitting such activities. The Department of Justice is firmly committed to enforcing the CSA in all states. As stated in the October 2009 memorandum from then Deputy Attorney General David Ogden, and in the memorandum issued yesterday by Deputy Attorney General James Cole, while the Department does not focus its limited resources on prosecuting seriously ill individuals who use marijuana as part of a medically recommended treatment regimen in compliance with state law, we will enforce the CSA vigorously against individuals and organizations that participate in unlawful manufacturing and distribution activity involving marijuana, even if such activities are permitted under state law.

Consistent with federal law, the Department maintains the authority to pursue criminal or civil actions for any CSA violations whenever the Department determines that such legal action is warranted. This includes, but is not limited to, actions to enforce the criminal provisions of the CSA such as Title 21, United States Code, Section 841, making it illegal to manufacture, distribute, or possess with intent to distribute any controlled substance including marijuana; Title 21, United States Code, Section 856, making it unlawful to knowingly open, lease, rent, maintain, or use property for the manufacturing, storing, or distribution of controlled substances; and Title 21, United States Code,

Section 846, making it illegal to conspire to commit any of the crimes set forth in the CSA. Federal money laundering and related statutes which prohibit a variety of different types of financial activity involving the movement of drug proceeds may likewise be utilized. The government may also pursue civil injunctions, and the forfeiture of drug proceeds, property traceable to such proceeds, and property used to facilitate drug violations.

The Department is concerned about the proposed ordinance in the City of Chico, as it would authorize conduct contrary to federal law and threatens the federal government's efforts to regulate the possession, manufacturing, and trafficking of controlled substances. Individuals who elect to operate industrial marijuana cultivation facilities will be doing so in violation of federal law. Others who knowingly facilitate such industrial cultivation activities, including property owners, landlords, and financiers, should also know that their conduct violates federal law.

I hope this letter assists you in making informed decisions regarding a proposed ordinance which would permit the establishment of significant marijuana cultivation facilities in the City of Chico.

Very truly yours,

Benjamin B. Wagner
United States Attorney
Eastern District of California

cc: Kamala D. Harris, Attorney General of the State of California
Mike Ramsey, Butte County District Attorney
David Burkland, Chico City Manager
Lori J. Barker, Chico City Attorney

EXHIBIT B

U.S. Department of Justice

United States Attorney
Northern District of California

Melinda Haag
United States Attorney

11th Floor, Federal Building
450 Golden Gate Avenue, Box 36055
San Francisco, California 94102-3495

(415) 436-7200
FAX:(415) 436-7234

August 15, 2011

Robert S. Wall
Director of Community Development
City of Eureka
531 K Street
Eureka, CA 95501-1146

Dear Mr. Wall:

I write in response to your letter dated August 8, 2011, seeking guidance regarding medical cannabis growing facilities in the City of Eureka, California.

As the Department has stated on many occasions, Congress has determined that marijuana is a controlled substance. Congress placed marijuana in Schedule I of the Controlled Substances Act (CSA) and, as such, growing, distributing, and possessing marijuana in any capacity, other than as part of a federally authorized research program, is a violation of federal law regardless of state laws permitting such activities.

The prosecution of individuals and organizations involved in the trade of any illegal drugs and the disruption of drug trafficking organizations is a core priority of the Department. This core priority includes prosecution of business enterprises that unlawfully market and sell marijuana. As stated in the October 2009 Ogden Memorandum and reiterated recently in the 2011 Cole Memorandum, the Department does not focus its limited resources on seriously ill individuals who use marijuana as part of a medically recommended treatment regimen in compliance with state law. However, individuals and organizations who are in the business of cultivating, selling, or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act and are subject to federal enforcement, even if such activities are permitted under state law.

Consistent with federal law, the Department maintains the authority to pursue criminal or civil actions for any CSA violations whenever the Department determines that such legal action is warranted. This includes, but is not limited to, actions to enforce the criminal provisions of the CSA such as Title 21 Section 841 making it illegal to manufacture, distribute, or possess with intent to distribute any controlled substance including marijuana; Title 21 Section 856 making it unlawful to knowingly open, lease, rent, maintain, or use property for the manufacturing, storing, or distribution of controlled substances; and Title 21 Section 846 making it illegal to conspire to commit any of the crimes set forth in the CSA. Federal money laundering and related statutes that prohibit a variety of different types of financial activity involving the movement of drug

proceeds may likewise be utilized. The government may also pursue civil injunctions, and the forfeiture of drug proceeds, property traceable to such proceeds, and property used to facilitate drug violations.

The Department is concerned about the City of Eureka's creation of a licensing scheme that permits large-scale industrial marijuana cultivation, processing, and distribution, as it authorizes conduct contrary to federal law and threatens the federal government's efforts to regulate the possession, manufacturing, and trafficking of controlled substances. Individuals who elect to operate any such facilities will be doing so in violation of federal law. Others who knowingly facilitate the actions of these individuals, including property owners, landlords, and financiers should also know that their conduct violates federal law. If the City of Eureka were to proceed, this office would consider injunctive actions, civil fines, criminal prosecution, and the forfeiture of any property used to facilitate a violation of the CSA. As the Attorney General has repeatedly stated, the Department of Justice remains firmly committed to enforcing the CSA in all states.

I hope this letter assists the City of Eureka in making informed decisions regarding this matter.

Very truly yours,

Melinda Haag
United States Attorney
Northern District of California

cc: David Tyson, City Manager
Mike Knight, Assistant City Manager
City Attorney

EXHIBIT C

--- Cal.Rptr.3d ----, 199 Cal.App.4th 1070, 2011 WL 4553155 (Cal.App. 2 Dist.), 11 Cal. Daily Op. Serv. 12,643, 2011 Daily Journal D.A.R. 15,028
(Cite as: 2011 WL 4553155 (Cal.App. 2 Dist.))

H

Court of Appeal, Second District, Division 3, California.
Ryan PACK et al., Petitioners,
v.
The SUPERIOR COURT of Los Angeles County, Respondent;
City of Long Beach, Real Party in Interest.

No. B228781.
Oct. 4, 2011.

Background: Medical marijuana collective members brought action against city for declaratory and injunctive relief challenging ordinance prohibiting "cultivation, possession, distribution, exchange or giving away" of medical marijuana except pursuant to a permit. The Superior Court, Los Angeles County, No. NC055010/NC055053,Patrick T. Madden, J., denied preliminary injunction. Members petitioned for writ of mandate.

Holdings: The Court of Appeal, Croskey, J., held that:
(1) ordinance requiring medical marijuana to be analyzed by independent laboratories was preempted by Controlled Substances Act (CSA), and
(2) ordinance requiring permits for medical marijuana collectives was preempted by CSA.

Petition granted.

West Headnotes

[1] Controlled Substances 96H ⚿51

96H Controlled Substances
96HII Offenses
96Hk48 Defenses
96Hk51 k. Medical Necessity. Most Cited Cases

Federal prohibition against the possession and distribution of marijuana does not include an exception for medical marijuana. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 202, 401(a)(1), 21 U.S.C.A. §§ 812, 841(a)(1); Controlled Substances Act, § 404, 21 U.S.C.A. § 844.

[2] Controlled Substances 96H ⚿3

96H Controlled Substances
96HI In General
96Hk1 Nature and Power to Regulate
96Hk3 k. Preemption. Most Cited Cases

States 360 ⚿18.65

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.65 k. Product Safety; Food and Drug Laws. Most Cited Cases

Compassionate Use Act (CUA) is not preempted by the Controlled Substances Act (CSA). Comprehensive Drug Abuse Prevention and Control Act of 1970, § 708, 21 U.S.C.A. § 903; West's Ann.Cal.Health & Safety Code § 11362.5(d).

[3] Controlled Substances 96H ⚿51

96H Controlled Substances
96HII Offenses
96Hk48 Defenses
96Hk51 k. Medical Necessity. Most Cited Cases

A person who supplies marijuana to a qualified patient is not an immune "primary caregiver" under the Compassionate Use Act (CUA) and Medical Marijuana Program Act (MMPA) unless the person consistently provided caregiving, independent of assistance in taking marijuana at or before the time the person assumed responsibility for assisting the patient with medical marijuana. West's Ann.Cal.Health & Safety Code §§ 11362.5(e), 11362.7(d).

[4] Controlled Substances 96H ⚿51

96H Controlled Substances

96HII Offenses
96Hk48 Defenses
96Hk51 k. Medical Necessity. Most Cited Cases

While the Compassionate Use Act (CUA) provides a defense at trial for those medical marijuana patients and their caregivers charged with the illegal possession or cultivation of marijuana, it provides for no immunity from arrest. West's Ann.Cal.Health & Safety Code § 11362.5.

[5] Controlled Substances 96H ⚿51

96H Controlled Substances
96HII Offenses
96Hk48 Defenses
96Hk51 k. Medical Necessity. Most Cited Cases

Medical Marijuana Program Act (MMPA) provisions limiting patients' and caregivers' possession of dried marijuana and marijuana plants establishes a "safe harbor" from arrest and prosecution for the possession of no more than the statutory amounts. West's Ann.Cal.Health & Safety Code § 11362.77 (a, f).

[6] Mandamus 250 ⚿172

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k172 k. Scope of Inquiry and Powers of Court. Most Cited Cases

Court of Appeal would not address medical marijuana collective members' argument that city ordinance prohibiting "cultivation, possession, distribution, exchange or giving away" of medical marijuana except pursuant to a permit was preempted by state law, in members' petition for writ of mandate challenging trial court's denial of declaratory and injunctive relief against city's closure of their dispensary, where members did not make the preemption allegation in their complaint, the city represented that the ordinance did not apply to prohibit personal cultivation and possession, and there was no evidence that it had been so applied. West's Ann.Cal.Health & Safety Code §§ 11362.5, 11362.775.

[7] Controlled Substances 96H ⚿51

96H Controlled Substances
96HII Offenses
96Hk48 Defenses
96Hk51 k. Medical Necessity. Most Cited Cases

City ordinance prohibiting membership in more than one medical marijuana collective "fully permitted in accordance with this Chapter" did not prohibit members from joining a new collective after theirs was shut down due to noncompliance with the ordinance.

[8] Evidence 157 ⚿1

157 Evidence
157I Judicial Notice
157k1 k. Nature and Scope in General. Most Cited Cases

In reviewing denial of preliminary injunction challenging city ordinance requiring permits for medical marijuana collectives, Court of Appeal would take judicial notice of the fact that a search using an Internet search engine revealed that several medical marijuana dispensaries were apparently operating in the city, although their websites did not specifically indicate whether they were permitted.

[9] Municipal Corporations 268 ⚿65

268 Municipal Corporations
268III Legislative Control of Municipal Acts, Rights, and Liabilities
268k65 k. Local Legislation. Most Cited Cases

Charter city's ordinances relating to matters which are purely municipal affairs prevail over state laws on the same subject.

[10] Equity 150 ⚿65(1)

150 Equity
150I Jurisdiction, Principles, and Maxims

150I(C) Principles and Maxims of Equity
150k65 He Who Comes Into Equity Must Come with Clean Hands
150k65(1) k. In General. Most Cited Cases

Medical marijuana collective members were not barred by the doctrine of unclean hands from arguing that the federal Controlled Substances Act (CSA) preempted city ordinance requiring permits for medical marijuana collectives, even if the members sought the ruling in order to continue to violate the federal CSA, since members' hands were not unclean under California law, and precluding challenges by parties who intended to violate the federal CSA would mean that no one would ever have standing to raise the preemption argument. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 708, 21 U.S.C.A. § 903.

[11] States 360 ⚖18.3

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.3 k. Preemption in General. Most Cited Cases

Supremacy Clause establishes a constitutional choice-of-law rule, makes federal law paramount, and vests Congress with the power to preempt state law. U.S.C.A. Const. Art. 6, cl. 2.

[12] States 360 ⚖18.13

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.13 k. State Police Power. Most Cited Cases

There is a presumption against federal preemption in those areas traditionally regulated by the states. U.S.C.A. Const. Art. 6, cl. 2.

[13] States 360 ⚖18.13

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.13 k. State Police Power. Most Cited Cases

Regulation of medical practices and state criminal sanctions for drug possession are historically matters of state police power, for purposes of the presumption against federal preemption in areas traditionally regulated by the states. U.S.C.A. Const. Art. 6, cl. 2.

[14] States 360 ⚖18.13

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.13 k. State Police Power. Most Cited Cases

A local government's land use regulation is an area over which local governments traditionally have control, for purposes of the presumption against federal preemption in areas traditionally regulated by the states. U.S.C.A. Const. Art. 6, cl. 2
.

[15] States 360 ⚖18.3

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.3 k. Preemption in General. Most Cited Cases

There are four species of federal preemption of state law: express, conflict, obstacle, and field; express preemption arises when Congress defines explicitly the extent to which its enactments preempt state law, conflict preemption will be found when simultaneous compliance with both state and federal directives is impossible, obstacle preemption arises when 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, and field preemption applies where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation. U.S.C.A. Const.

Art. 6, cl. 2.

[16] States 360 ⚖18.11

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.11 k. Congressional Intent. Most Cited Cases

Where a statute contains an express pre-emption clause, the court's task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent. U.S.C.A. Const. Art. 6, cl. 2.

[17] Controlled Substances 96H ⚖3

96H Controlled Substances
96HI In General
96Hk1 Nature and Power to Regulate
96Hk3 k. Preemption. Most Cited Cases

States 360 ⚖18.65

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.65 k. Product Safety; Food and Drug Laws. Most Cited Cases

Federal Controlled Substances Act (CSA) preempts conflicting laws under both conflict and obstacle preemption. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 708, 21 U.S.C.A. § 903.

[18] States 360 ⚖18.5

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.5 k. Conflicting or Conforming Laws or Regulations. Most Cited Cases

Conflict or "impossibility" preemption is a demanding defense, requiring establishing that it is impossible to comply with the requirements of both laws. U.S.C.A. Const. Art. 6, cl. 2.

[19] Controlled Substances 96H ⚖3

96H Controlled Substances
96HI In General
96Hk1 Nature and Power to Regulate
96Hk3 k. Preemption. Most Cited Cases

Municipal Corporations 268 ⚖53

268 Municipal Corporations
268II Governmental Powers and Functions in General
268k52 Political Status and Relations
268k53 k. In General. Most Cited Cases

City ordinance requiring permits for medical marijuana collectives was not subject to conflict preemption by the federal Controlled Substances Act (CSA), since a person could comply with both simply by not being involved in the cultivation or possession of medical marijuana at all. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 708, 21 U.S.C.A. § 903.

[20] Controlled Substances 96H ⚖3

96H Controlled Substances
96HI In General
96Hk1 Nature and Power to Regulate
96Hk3 k. Preemption. Most Cited Cases

Municipal Corporations 268 ⚖53

268 Municipal Corporations
268II Governmental Powers and Functions in General
268k52 Political Status and Relations
268k53 k. In General. Most Cited Cases

City ordinance requiring that permitted medical marijuana collectives have samples of their marijuana analyzed by an independent laboratory to ensure that it was free from pesticides and contaminants was subject to conflict preemption by the federal Controlled Substances Act (CSA), since delivering the marijuana for testing would violate the CSA. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 708, 21 U.S.C.A. § 903.

[21] States 360 ⚿18.5

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.5 k. Conflicting or Conforming Laws or Regulations. Most Cited Cases

If a federal act's operation would be frustrated and its provisions refused their natural effect by the operation of a state or local law, the latter must yield pursuant to obstacle preemption. U.S.C.A. Const. Art. 6, cl. 2.

[22] Controlled Substances 96H ⚿5

96H Controlled Substances
96HI In General
96Hk4 Statutes and Other Regulations
96Hk5 k. In General. Most Cited Cases

Main objectives of the federal Controlled Substances Act (CSA) are combating drug abuse and controlling the legitimate and illegitimate traffic in controlled substances, with a particular concern of preventing the diversion of drugs from legitimate to illicit channels. Controlled Substances Act, § 101, 21 U.S.C.A. § 801.

[23] Controlled Substances 96H ⚿3

96H Controlled Substances
96HI In General
96Hk1 Nature and Power to Regulate
96Hk3 k. Preemption. Most Cited Cases

Municipal Corporations 268 ⚿53

268 Municipal Corporations
268II Governmental Powers and Functions in General
268k52 Political Status and Relations
268k53 k. In General. Most Cited Cases

City ordinance requiring permits for medical marijuana collectives was subject to obstacle preemption by the federal Controlled Substances Act (CSA), where the ordinance purported to authorize the collectives, city charged substantial application and renewal fees, city randomly chose qualified applicants to receive permits, and it was the possession of the permit itself, rather than any particular conduct, which exempted a collective from violation proceedings. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 708, 21 U.S.C.A. § 903.

See Annot., Preemption of State Regulation of Controlled Substances by Federal Controlled Substances Act (2010) 60 A.L.R.6th 175; Cal. Jur. 3d, Criminal Law: Crimes Against Administration of Justice and Public Order, § 39; 2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 63; 2 Witkin & Epstein, Cal. Criminal Law (2011 supp.) Crimes Against Public Peace and Welfare, § 70B.

[24] Criminal Law 110 ⚿1

110 Criminal Law
110I Nature and Elements of Crime
110k1 k. Nature of Crime in General. Most Cited Cases

There is a distinction, in law, between not making an activity unlawful and making the activity lawful.

[25] States 360 ⚿18.5

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.5 k. Conflicting or Conforming Laws or Regulations. Most Cited Cases

When an act is prohibited by federal law, but neither prohibited nor authorized by state law, there is no obstacle preemption. U.S.C.A. Const. Art. 6, cl. 2.

[26] States 360 ⚿18.5

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.5 k. Conflicting or Conforming Laws or Regulations. Most Cited Cases

A law which authorizes individuals to engage in conduct that a federal act forbids stands as an

obstacle to the accomplishment and execution of the full purposes and objectives of Congress, and is therefore preempted. U.S.C.A. Const. Art. 6, cl. 2.

[27] Controlled Substances 96H ⚿3

96H Controlled Substances
96HI In General
96Hk1 Nature and Power to Regulate
96Hk3 k. Preemption. Most Cited Cases

Court of Appeal would place "some weight" on the position of the United States Attorney General, in determining whether city ordinance requiring permits for medical marijuana collectives was subject to obstacle preemption by the federal Controlled Substances Act (CSA). Comprehensive Drug Abuse Prevention and Control Act of 1970, § 708, 21 U.S.C.A. § 903.

[28] Controlled Substances 96H ⚿3

96H Controlled Substances
96HI In General
96Hk1 Nature and Power to Regulate
96Hk3 k. Preemption. Most Cited Cases

States 360 ⚿18.65

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.65 k. Product Safety; Food and Drug Laws. Most Cited Cases

State and local laws which license the large-scale cultivation and manufacture of marijuana stand as an obstacle to federal enforcement efforts, as would support obstacle preemption by the federal Controlled Substances Act (CSA). Comprehensive Drug Abuse Prevention and Control Act of 1970, § 708, 21 U.S.C.A. § 903.

[29] Controlled Substances 96H ⚿3

96H Controlled Substances
96HI In General
96Hk1 Nature and Power to Regulate
96Hk3 k. Preemption. Most Cited Cases

Municipal Corporations 268 ⚿53

268 Municipal Corporations
268II Governmental Powers and Functions in General
268k52 Political Status and Relations
268k53 k. In General. Most Cited Cases

City ordinance prohibiting medical marijuana collectives from providing medical marijuana to their members between the hours of 8:00 p.m. and 10:00 a.m. was not preempted by the federal Controlled Substances Act (CSA), since it did not permit or authorize activity prohibited by the CSA. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 708, 21 U.S.C.A. § 903.

[30] Controlled Substances 96H ⚿3

96H Controlled Substances
96HI In General
96Hk1 Nature and Power to Regulate
96Hk3 k. Preemption. Most Cited Cases

Municipal Corporations 268 ⚿53

268 Municipal Corporations
268II Governmental Powers and Functions in General
268k52 Political Status and Relations
268k53 k. In General. Most Cited Cases

City ordinance prohibiting a person under the age of 18 from being on the premises of a medical marijuana collective unless that person is a qualified patient accompanied by his or her physician, parent or guardian was not preempted by the federal Controlled Substances Act (CSA), since it did not permit or authorize activity prohibited by the CSA. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 708, 21 U.S.C.A. § 903.

[31] Controlled Substances 96H ⚿3

96H Controlled Substances
96HI In General
96Hk1 Nature and Power to Regulate
96Hk3 k. Preemption. Most Cited Cases

Municipal Corporations 268 ⚿53

268 Municipal Corporations
268II Governmental Powers and Functions in General
268k52 Political Status and Relations
268k53 k. In General. Most Cited Cases

City ordinance prohibiting medical marijuana collectives from permitting the consumption of alcohol on the property or in its parking area was not preempted by the federal Controlled Substances Act (CSA), since it did not permit or authorize activity prohibited by the CSA. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 708, 21 U.S.C.A. § 903.

[32] Controlled Substances 96H ⚿3

96H Controlled Substances
96HI In General
96Hk1 Nature and Power to Regulate
96Hk3 k. Preemption. Most Cited Cases

Municipal Corporations 268 ⚿53

268 Municipal Corporations
268II Governmental Powers and Functions in General
268k52 Political Status and Relations
268k53 k. In General. Most Cited Cases

City ordinance's restrictions against medical marijuana collectives located in an exclusive residential zone, or within a 1,500 foot radius of a high school or 1,000 foot radius of a kindergarten, elementary, middle, or junior high school, if imposed strictly as a limitation on the operation of medical marijuana collectives in the city, would not be federally preempted by the Controlled Substances Act (CSA). Comprehensive Drug Abuse Prevention and Control Act of 1970, § 708, 21 U.S.C.A. § 903.

West Codenotes
Recognized as UnconstitutionalWest's Ann.Cal.Health & Safety Code § 11362.77(a), (f).
Matthew S. Pappas, Mission Viejo, for Petitioners.

Scott Michelman, Michael T. Risher and M. Allen Hopper (N. California), Peter Bibring (S.California), and David Blair–Loy (San Diego & Imperial Counties) for American Civil Liberties Union as Amici Curiae on behalf of Petitioners.

Daniel Abrahamson, Theshia Naidoo and Tamar Todd for Drug Policy Alliance as Amicus Curiae on behalf of Petitioners.

Joseph D. Elford for Americans for Safe Access as Amicus Curiae on behalf of Petitioners.

No appearance for Respondent.

Robert E. Shannon, City Attorney (Long Beach), Monte H. Machit, Principal Deputy City Attorney, Theodore B. Zinger and Cristyl A. Meyers, Deputy City Attorneys, for Real Party in Interest.

Carmen A. Trutanich, City Attorney, Carlos De La Guerra, Managing Assistant City Attorney, and Heather Aubry, Deputy City Attorney, for Los Angeles City Attorney's Office as Amicus Curiae on behalf of Real Party in Interest.

William James Murphy, County Counsel (Tehama), and Arthur J. Wylene, Assistant County Counsel, for California State Association of Counties and League of California Cities as Amici Curiae on behalf of Real Party in Interest.

CROSKEY, J.

***1** [1] Federal law prohibits the possession and distribution of marijuana (21 U.S.C. §§ 812, 841(a)(1), 844); there is no exception for medical marijuana. (*United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483, 490, 121 S.Ct. 1711, 149 L.Ed.2d 722.) Although California criminalizes the possession and cultivation of marijuana generally (Health & Saf.Code, §§ 11357, 11358), it has decriminalized the possession and cultivation of medical marijuana, when done pursuant to a physician's recommendation. (Health & Saf.Code, § 11362.5, subd. (d).) Further, California law decriminalizes the collective or cooperative cultivation of medical marijuana. (Health &

Saf.Code, § 11362.775.) Case law has concluded that California's statutes are not preempted by federal law, as they seek only to decriminalize certain conduct for the purposes of state law. (*Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 757, 115 Cal.Rptr.3d 89.)

In this case, we are concerned with a city ordinance which goes beyond simple decriminalization. The City of Long Beach (City) has enacted a comprehensive regulatory scheme by which medical marijuana collectives within the City are governed. The City charges application fees (Long Beach Mun.Code, ch. 5.87, § 5.87.030), holds a lottery, and issues a limited number of permits. Permitted collectives, which must then pay an annual fee, are highly regulated, and subject to numerous restrictions on their operation (Long Beach Mun.Code, ch. 5.87, § 5.87.040). The question presented by this case is whether the City's ordinance, which permits and regulates medical marijuana collectives rather than merely decriminalizing specific acts, is preempted by federal law. In this case of first impression, we conclude that, to the extent it permits collectives, it is.

STATUTORY AND REGULATORY BACKGROUND

Before addressing the specific factual and procedural background of this case, we first discuss the contradictory federal and state statutory schemes which govern medical marijuana. This case concerns the interplay between the federal Controlled Substances Act (CSA), and the state Compassionate Use Act (CUA) and Medical Marijuana Program Act (MMPA).

1. *The Federal CSA*

"Enacted in 1970 with the main objectives of combating drug abuse and controlling the legitimate and illegitimate traffic in controlled substances, the CSA creates a comprehensive, closed regulatory regime criminalizing the unauthorized manufacture, distribution, dispensing, and possession of substances classified in any of the Act's five schedules." (*Gonzales v. Oregon* (2006) 546 U.S. 243, 250, 126 S.Ct. 904, 163 L.Ed.2d 748.) Enactment of the federal CSA was part of President Nixon's "war on drugs." (*Gonzales v. Raich* (2005) 545 U.S. 1, 10, 125 S.Ct. 2195, 162 L.Ed.2d 1.) "Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels." (*Id.* at pp. 12–13, 125 S.Ct. 2195.)

The federal CSA includes marijuana [FN1] on schedule I, the schedule of controlled substances which are subject to the most restrictions. (21 U.S.C. § 812.) Drugs on other schedules may be dispensed and prescribed for medical use; drugs on schedule I may not. (*United States v. Oakland Cannabis Buyers' Cooperative, supra,* 532 U.S. at p. 491, 121 S.Ct. 1711.) The inclusion of marijuana on schedule I reflects a government determination that "marijuana has 'no currently accepted medical use' at all." (*Ibid.*) Therefore, the federal CSA makes it illegal to manufacture, distribute, or possess marijuana. (21 U.S.C. §§ 841, 844.) It is also illegal, under the federal CSA, to maintain any place for the purpose of manufacturing, distributing, or using any controlled substance. (21 U.S.C. § 856(a)(1).) The only exception to these prohibitions is the possession and use of marijuana in federally-approved research projects. (*United States v. Oakland Cannabis Buyers' Cooperative, supra,* 532 U.S. at pp. 489–490, 121 S.Ct. 1711.)

***2** The federal CSA contains a provision setting forth the extent to which it preempts other laws. It 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 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.) The precise scope of this provision is a matter of dispute in this case.

2. *The CUA*

While the federal government, by classifying

marijuana as a schedule I drug, has concluded that marijuana has no currently accepted medical use, there is substantial debate on the issue. (See *Conant v. Walters* (9th Cir.2002) 309 F.3d 629, 640–643 (conc. opn. of Kozinski, J.).) In 1996, California voters concluded that marijuana does have valid medical uses, and sought to decriminalize the medical use of marijuana by approving, by initiative measure, the CUA.

The CUA added section 11362.5 to the Health and Safety Code. Its purposes include: (1) "[t]o 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 in the treatment of cancer , anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief"; (2) "[t]o 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) "[t]o 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 need of marijuana." (Health & Saf.Code, § 11362.5, subds. (b)(1)(A), (b)(1)(B) & (b)(1)(C).)

[2] To achieve these ends, the CUA provides, " Section 11357, relating to the possession of marijuana,[FN2] and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver,[FN3] who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." (Health & Saf.Code, § 11362.5, subd. (d).) As noted above, this statute, which simply decriminalizes for the purposes of state law certain conduct related to medical marijuana, is not preempted by the CSA. (*Qualified Patients Assn. v. City of Anaheim, supra,* 187 Cal.App.4th at p. 757, 115 Cal.Rptr.3d 89.)

3. *The MMPA*

The MMPA was enacted by the Legislature in 2003. The purposes of the MMPA include: (1) to "[p]romote uniform and consistent application of the [CUA] among the counties within the state" and (2) to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." (Stats.2003, ch. 875 (S.B.420), § 1, subds. (b)(2) & (b)(3).) The MMPA contains several provisions intended to meet these purposes.

***3** [3] First, the MMPA expands the immunities provided by the CUA. While the CUA decriminalizes the cultivation and possession of medical marijuana by patients and their primary caregivers,[FN4] the MMPA extends that decriminalization to possession for sale, transportation, sale, maintaining a place for sale or use, and other offenses. Cultivation or distribution for profit, however, is still prohibited. (Health & Saf.Code, § 11362.765.)

[4] Second, while the CUA provides a defense *at trial* for those medical marijuana patients and their caregivers charged with the illegal possession or cultivation of marijuana, it provides for no immunity from *arrest.* (*People v. Mower* (2002) 28 Cal.4th 457, 469, 122 Cal.Rptr.2d 326, 49 P.3d 1067.) The MMPA provides that immunity by means of a voluntary identification card system. Individuals with physician recommendations for marijuana, and their designated primary caregivers, may obtain identification cards identifying them as such.[FN5] Under the MMPA, no person in possession of a valid identification card shall be subject to arrest for enumerated marijuana offenses. However, a person need not have an identification card to claim the protections from the criminal laws provided by the CUA. (Health & Saf.Code, § 11362.71.)

[5] Third, the MMPA set limits on the amount of medical marijuana which may be possessed. Health & Safety Code section 11362.77 provides that, unless a doctor specifically recommends more[FN6] (Health & Saf.Code, § 11362.77, subd. (b)), a

qualified patient or primary caregiver "may possess no more than eight ounces of dried marijuana per qualified patient. In addition, a qualified patient or primary caregiver may also maintain no more than six mature or 12 immature marijuana plants per qualified patient." [FN7] (Health & Saf.Code, § 11362.77, subd. (a).) This provision establishes a "safe harbor" from arrest and prosecution for the possession of no more than these set amounts.[FN8] (Health & Saf.Code, § 11362.77, subd. (f).)

Fourth, the MMPA decriminalizes the collective or cooperative cultivation of marijuana, providing that qualified patients and their primary 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 identifying conduct otherwise decriminalized under the MMPA]." (Health & Saf.Code, § 11362.775.)

Two other provisions of the MMPA are relevant to our analysis. First, the MMPA provides for local regulation, stating, "Nothing in this article shall prevent a city or other local governing body from adopting and enforcing laws consistent with this article." [FN9] (Health & Saf.Code, § 11362.83.) This has been interpreted to permit cities and counties to impose greater restrictions on medical marijuana collectives than those imposed by the MMPA. (*County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861, 867–868, 121 Cal.Rptr.3d 722.)

***4** Second, in 2010, the Legislature amended the MMPA to impose restrictions on the location of medical marijuana collectives. Health & Safety Code section 11362.768, subdivision (b), provides that 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." Subdivision (c) restricts the operation of subdivision (b) to only those providers that have a "storefront or mobile retail outlet which ordinarily requires a business license." [FN10] In other words, private collectives are immune from this requirement. The section goes on to provide, "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." (Health & Saf.Code, section 11362.768, subd. (f).) Moreover, the subdivision provides that it shall not preempt local ordinances adopted prior to January 1, 2011 that regulate the locations or establishments of medical marijuana cooperatives, collectives, dispensaries, operators, establishments, or providers. (Health & Saf.Code, section 11362.768, subd. (g).)

In 2008, the Attorney General issued Guidelines for the Security and Non–Diversion of Marijuana Grown for Medical Use (Guidelines). (<http://ag.ca.gov/cms_attachments/press/pdfs/n1601_medicalmarijuanaguidelines.pdf> [as of Oct. 3, 2011].) The Guidelines addressed several issues pertaining to medical marijuana, including taxation,[FN11] federal preemption,[FN12] and arrest under federal law.[FN13] The Guidelines also discussed collectives, cooperatives, and dispensaries, indicating that they should acquire medical marijuana only from their members, and distribute it only among their members. (Guidelines, *supra,* at p. 10.) The Guidelines added the following, regarding dispensaries: "Although medical marijuana 'dispensaries' have been operating in California for years, dispensaries, as such, are not recognized under the law. As noted above, the only recognized group entities are cooperatives and collectives.[FN14] [Citation.] It is the opinion of this Office that a properly organized and operated collective or cooperative that dispenses medical marijuana through a storefront may be lawful under California law, but that dispensaries that do not substantially comply with the guidelines [above] are likely operating outside the protections of [the CUA] and the MMP[A], and that the individuals operating such entities may be subject to arrest and criminal prosecution under Cali-

fornia law. For example, dispensaries that merely require patients to complete a form summarily designating the business owner as their primary caregiver—and then offering marijuana in exchange for cash 'donations'—are likely unlawful." (Guidelines, *supra,* at p. 11.)

FACTUAL AND PROCEDURAL BACKGROUND

1. *The City's Ordinance*

***5** In 2010, the City adopted an ordinance (Long Beach Ordinance No. 10–0007) intended to comprehensively regulate medical marijuana collectives within the City. The ordinance defines a collective as an association of four or more qualified patients and their primary caregivers who associate at a location within the City to collectively or cooperatively cultivate medical marijuana. (Long Beach Mun.Code, ch. 5.87, § 5.87.015, subd. J.)

The City's ordinance not only restricts the location of medical marijuana collectives (Long Beach Mun.Code, ch. 5.87, § 5.87.040, subds. A, B, & C), but also regulates their operation by means of a permit system (Long Beach Mun.Code, ch. 5.87, § 5.87.020). The City requires all collectives which seek to operate in the City, including those that were in operation at the time the ordinance was adopted,[FN15] to submit applications and a nonrefundable application fee. (Long Beach Mun.Code, ch. 5.87, § 5.87.030.) The City has set this fee at $14,742. The qualified applicants then participate in a lottery for a limited number of permits.[FN16] (Ex. 3, att.D, p. 2.) Only those medical marijuana collectives which have been issued Medical Marijuana Collective Permits may operate in the City. (Long Beach Mun.Code, ch. 5.87, § 5.87.020.)

In order to obtain a permit, a collective must demonstrate its compliance, and assure its continued compliance, with certain requirements. (Long Beach Mun.Code, ch. 5.87, § 5.87.040.) These include the installation of sound insulation (*id.* at subd. G), odor absorbing ventilation (*id.* at subd. H), closed-circuit television monitoring[FN17] (*id.* at subd. I), and centrally-monitored fire and burglar alarm systems (*id.* at subd. J). Collectives must also agree that representative samples of the medical marijuana they distribute will have been analyzed by an independent laboratory to ensure that it is free of pesticides and contaminants. (*Id.* at subd. T.)

Once a permit has been issued, an "Annual Regulatory Permit Fee" is also imposed, based on the size of the collective. That fee is $10,000 for a collective with between 4 and 500 members, and increases with the size of the collective.

[6][7] The permitted collective system is the exclusive means of collective cultivation of medical marijuana in Long Beach.[FN18] The ordinance provides that it is "unlawful for any person to cause, permit or engage in the cultivation, possession, distribution, exchange or giving away of marijuana for medical or non medical purposes except as provided in this Chapter, and pursuant to any and all other applicable local and state law."[FN19] (Long Beach Mun.Code, ch. 5.87, § 5.87.090, subd. A.) The ordinance further provides that no person shall be a member of more than one collective "fully permitted in accordance with this Chapter."[FN20] (*Id.* at subd. N.) Violations of the ordinance are misdemeanors, as well as enjoinable nuisances per se. (Long Beach Mun.Code, ch. 5.87, § 5.87.100.)

***6** The City set a timeline for its initial permit lottery. Applications were to be accepted between June 1 and June 18, 2010; the City was to review the applications for compliance from June 21 through September 16, 2010; the lottery would be held on September 20, 2010; and site inspections, public notice and a hearing process would occur between September 21, 2010 and December 15, 2010. However, the City indicated that any collective that did not comply with the ordinance must cease operations by August 29, 2010.

2. *Plaintiffs' Complaint and Request for Preliminary Injunction*

Plaintiffs Ryan Pack and Anthony Gayle were

members of medical marijuana collectives that were directed to cease operations by August 29, 2010, for non-compliance with the ordinance. On August 30, 2010, plaintiffs filed the instant action seeking declaratory relief that the ordinance is invalid as it is preempted by federal law. On September 14, 2010, plaintiffs filed a request for a preliminary injunction. By this time, the City had shut down the collectives of which plaintiffs were members. However, as the lottery had not yet been held, no collectives had been issued permits in accordance with the ordinance. The plaintiffs thus argued that they would be irreparably harmed by the continued enforcement of the ordinance, as there was *no collective* they could legally join in order to obtain their necessary medical marijuana. As to the probability of success, plaintiffs argued that the City's ordinance went beyond decriminalization and instead *permitted* conduct prohibited by the federal CSA, and thus was preempted.

3. *The City's Opposition to the Preliminary Injunction Request*

On September 24, 2010, the City opposed the request for preliminary injunction, arguing that the ordinance was not preempted because it did not affect those responsible for enforcing the federal CSA. The City also raised an unclean hands argument, briefly suggesting that plaintiffs could not complain of any harm because their collectives "opened up for business" in an "unpermitted illegal manner."

4. *The Trial Court's Denial of the Request for Preliminary Injunction*

After a hearing, the trial court denied the request for a preliminary injunction. Its order issued on November 2, 2010. The court ultimately declined to address the federal preemption argument, on the basis of unclean hands. The court rejected the unclean hands argument raised by the City; however, it concluded that plaintiffs could not be heard to argue that the City ordinance was preempted due to a conflict with federal law (the CSA), when plaintiffs sought this ruling so that they could continue to violate the very same federal law. The court stated, "It is hardly equitable for [p]laintiffs to ask the court to enforce a federal law that they themselves are indisputably violating." FN21

5. *The Plaintiffs' Petition for Writ of Mandate*

On November 15, 2010, plaintiffs filed the instant petition for writ of mandate, challenging the trial court's denial of a preliminary injunction. We issued an order to show cause, seeking briefing on the federal preemption issue. We invited amicus briefing from various entities on both sides of the issue, including other cities considering or enacting medical marijuana collective ordinances, the U.S. Attorneys for California districts, the ACLU, and organizations advocating the legalization of marijuana. We received amicus briefing from: (1) the City of Los Angeles; (2) the California State Association of Counties and League of California Cities; and (3) the ACLU, ACLU of Northern California, ACLU of Southern California, ACLU of San Diego and Imperial Counties, Drug Policy Alliance, and Americans for Safe Access. Although the U.S. Attorneys declined to file amicus briefs, we have taken judicial notice of letters and memoranda which illuminate the federal government's position regarding the enforcement of the CSA with respect to medical marijuana collectives.

6. *The Progress of the Lottery and Permitting System*

***7** [8] As briefing proceeded in this case, the City's permit lottery was conducted. According to a representation in the City's respondent's brief, the City received 43 applications, and the lottery resulted in 32 applications moving forward in the permit process. By the time briefing was closed, plaintiffs acknowledged that the permit process had resulted in a permit being issued for at least one collective, Herbal Solutions. FN22

ISSUE PRESENTED

The sole issue presented by this writ proceeding FN23 is whether the City's ordinance is preempted by the federal CSA. We conclude that it is, in part, and therefore grant the plaintiffs' petition.

DISCUSSION

1. *Standard of Review*

"Two interrelated factors bear on the issuance of a preliminary injunction-[t]he likelihood of the plaintiff's success on the merits at trial and the balance of harm to the parties in issuing or denying injunctive relief." (*County of Los Angeles v. Hill, supra,* 192 Cal.App.4th at p. 866, 121 Cal.Rptr.3d 722.) It is clear, in this case, that if the City's ordinance is invalid as a matter of law, plaintiffs had a 100% probability of prevailing, and a preliminary injunction therefore should have been entered.

[9][10] Whether an ordinance is valid is a question of law. (*Zubarau v. City of Palmdale* (2011) 192 Cal.App.4th 289, 305, 121 Cal.Rptr.3d 172.) Whether a local ordinance is preempted by federal law is a question of law on undisputed facts.[FN24] (*Ibid.*) We therefore review the issue de novo.[FN25] (*Ibid.*)

2. *Law of Preemption*

[11] "The 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." (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 935, 63 Cal.Rptr.3d 50, 162 P.3d 569.)

[12][13][14] "There is a presumption against federal preemption in those areas traditionally regulated by the states." (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc., supra,* 41 Cal.4th at p. 938, 63 Cal.Rptr.3d 50, 162 P.3d 569.) Regulation of medical practices and state criminal sanctions for drug possession are historically matters of state police power. (*Qualified Patients Assn. v. City of Anaheim, supra,* 187 Cal.App.4th at p. 757, 115 Cal.Rptr.3d 89.) More importantly, a local government's land use regulation is an area over which local governments traditionally have control. (*City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1169, 100 Cal.Rptr.3d 1.) Thus, we assume the presumption against federal preemption applies in this instance. Therefore, " '[w]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' [Citations.]" (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc., supra,* 41 Cal.4th at p. 938, 63 Cal.Rptr.3d 50, 162 P.3d 569.)

[15] "There are four species of federal preemption: express, conflict, obstacle, and field." (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc., supra,* 41 Cal.4th at p. 935, 63 Cal.Rptr.3d 50, 162 P.3d 569.) "First, express preemption arises when Congress 'define[s] explicitly the extent to which its enactments pre-empt state law. [Citation.] Pre-emption fundamentally is a question of congressional intent, [citation], and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.' [Citations.] Second, conflict preemption will be found when simultaneous compliance with both state and federal directives is impossible. [Citations.] Third, obstacle preemption arises when ' "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." ' [Citations.] Finally, field preemption, i.e., 'Congress' intent to pre-empt all state law in a particular area,' applies 'where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation.' [Citation.]" (*Id.* at p. 936, 63 Cal.Rptr.3d 50, 162 P.3d 569.)

***8** [16] "Where a statute 'contains an express pre-emption clause, our "task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." ' [Citation.]" (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc., supra,* 41 Cal.4th at p. 941, fn. 6, 63 Cal.Rptr.3d 50, 162 P.3d 569.) In this case, we are concerned with the

federal CSA, which contains an express preemption clause: "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 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.)

[17] It is undisputed that this provision eliminates any possibility of the federal CSA preempting a state statute (or local ordinance) under the principles of field preemption or express preemption (*e.g., Qualified Patients Assn. v. City of Anaheim, supra,* 187 Cal.App.4th at p. 758, 115 Cal.Rptr.3d 89). It is also undisputed that, under this provision, the federal CSA would preempt any state or local law which fails the test for conflict preemption. (*County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 823, 81 Cal.Rptr.3d 461.) One California court has concluded that the federal CSA's preemption language bars the consideration of obstacle preemption. (*Id.* at pp. 823–825, 81 Cal.Rptr.3d 461.) Another court, without specifically addressing the conflicting authority, concluded that the federal CSA preempts conflicting laws under both conflict and obstacle preemption. (*Qualified Patients Assn. v. City of Anaheim, supra,* 187 Cal.App.4th at p. 758, 115 Cal.Rptr.3d 89.)

We believe this question was resolved by the United States Supreme Court in *Wyeth v. Levine* (2009) 555 U.S. 555, 129 S.Ct. 1187, 173 L.Ed.2d 51, a case which was decided after the decision in *County of San Diego v. San Diego NORML, supra,* 165 Cal.App.4th 798, 81 Cal.Rptr.3d 461. In *Wyeth,* the Supreme Court was concerned with the preemptive effect of the Food, Drug, and Cosmetic Act (FDCA). The FDCA provided that "a provision of state law would only be invalidated upon a 'direct and positive conflict' with the FDCA." (*Wyeth v. Levine, supra,* 555 U.S. at p. ——, 129 S.Ct at p. 1196.) Given this language, the Supreme Court considered both conflict and obstacle preemption. (*Id.* at p. ——, 129 S.Ct. at p. 1199.) As there is no distinction between a federal statute which will only preempt those state and local laws which create a "direct and positive conflict" (FDCA) and those which create "a positive conflict ... so that the two cannot consistently stand together" (CSA), we conclude that the same construction applies here, and the federal CSA can preempt state and local laws under both conflict and obstacle preemption.

***9** Indeed, the Supreme Court has cautioned against drawing a practical distinction between these two types of preemption. "This Court, when describing conflict pre-emption, has spoken of pre-empting state law that 'under the circumstances of th[e] particular case ... stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'—whether that 'obstacle' goes by the name of 'conflicting; contrary to; ... repugnance; difference; irreconcilability; inconsistency; violation; curtailment; ... interference,' or the like. [Citations.] 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, [citations], and it has assumed that Congress would not want either kind of conflict. 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, [citations]. We see no grounds, then, for attempting to distinguish among types of federal-state conflict for purposes of analyzing whether such a conflict warrants pre-emption in a particular case. That kind of analysis, moreover, would engender legal uncertainty with its inevitable system-wide 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 ... both." (*Geier v. American Honda Motor Company, Inc.* (2000) 529 U.S. 861, 873–874, 120 S.Ct. 1913, 146 L.Ed.2d 914.)

Thus, we turn our analysis to the issue of whether the federal CSA preempts the City's ordinance, under either conflict or obstacle preemption.

a. *Conflict Preemption*

[18][19] Conflict or "impossibility" preemption "is a demanding defense." (*Wyeth v. Levine, supra,* 555 U.S. at p. ——, 129 S.Ct. at p. 1199.) It requires establishing that it is impossible to comply with the requirements of both laws. (*Ibid.*) At first blush, no impossibility preemption is established by this case. While the federal CSA prohibits manufacture, distribution, and possession of marijuana, the City ordinance does not *require* any such acts. (See *Qualified Patients Assn. v. City of Anaheim, supra,* 187 Cal.App.4th at p. 759, 115 Cal.Rptr.3d 89 [stating that a "claim of positive conflict might gain more traction if the [City] *required* ... individuals to possess, cultivate, transport, possess for sale, or sell medical marijuana in a manner that violated federal law"].) Since a person can comply with both the federal CSA and the City ordinance by simply not being involved in the cultivation or possession of medical marijuana at all, there is no conflict preemption. (Cf. *Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc., supra,* 41 Cal.4th at p. 944, 63 Cal.Rptr.3d 50, 162 P.3d 569 [no conflict preemption because it is not a physical impossibility to simultaneously comply with both a federal law allowing conduct and a state law prohibiting it].)

***10** [20] We are, however, troubled by one provision of the City's ordinance, the provision requiring that permitted collectives have samples of their medical marijuana analyzed by an independent laboratory to ensure that it is free from pesticides and contaminants. (Long Beach Mun.Code, ch. 5.87, § 5.87.040, subd. T.) We question how an otherwise permitted collective can comply with this provision without violating the federal CSA's prohibition on distributing marijuana.[FN26] In other words, this provision appears to *require* that certain individuals violate the federal CSA. In an amicus brief in support of the City, the California State Association of Counties and League of California Cities argue that the only individuals being required to distribute marijuana under this provision are already violating the federal CSA by operating a medical marijuana collective. In other words, these amici argue that this section of the ordinance "does not compel any person who does not desire to possess or distribute marijuana to do so." We find this argument unavailing. That a person desires to possess or distribute marijuana to some degree (by operating a collective) does not necessarily imply that the person is also desirous of committing additional violations of the federal CSA (by delivering the marijuana for testing). The City cannot compel permitted collectives to distribute marijuana for testing any more than it can compel a burglar to commit additional acts of burglary. In this limited respect, conflict preemption applies.[FN27]

b. *Obstacle Preemption*

[21] Obstacle preemption arises when the challenged law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. (*Qualified Patients Assn. v. City of Anaheim, supra,* 187 Cal.App.4th at p. 760, 115 Cal.Rptr.3d 89.) "As a majority of the current United States Supreme Court has agreed at one time or another, 'pre-emption analysis is not "[a] free-wheeling judicial inquiry into whether a state statute is in tension with federal objectives," [citation], but an inquiry into whether the ordinary meanings of state and federal law conflict.' [Citations.]" (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc., supra,* 41 Cal.4th at pp. 939–940, 63 Cal.Rptr.3d 50, 162 P.3d 569.) If the federal act's operation would be frustrated and its provisions refused their natural effect by the operation of the state or local law, the latter must yield. (*Qualified Patients Assn. v. City of Anaheim,*

supra, 187 Cal.App.4th at p. 760, 115 Cal.Rptr.3d 89.)

[22] The United States Supreme Court has already set forth the purposes of the federal CSA. As discussed above, the main objectives of the federal CSA are "combating drug abuse and controlling the legitimate and illegitimate traffic in controlled substances," (*Gonzales v. Oregon, supra,* 546 U.S. at p. 250, 126 S.Ct. 904), with a particular concern of preventing "the diversion of drugs from legitimate to illicit channels." (*Gonzales v. Raich, supra,* 545 U.S. at pp. 12–13, 125 S.Ct. 2195.)

***11** [23] For this reason, we disagree with our colleagues who, in two other appellate opinions, have implied that medical marijuana laws might not pose an obstacle to the accomplishment of the purposes of the federal CSA because the purpose of the federal CSA is to combat recreational drug use, not regulate a state's medical practices. (*Qualified Patients Assn. v. City of Anaheim, supra,* 187 Cal.App.4th at p. 760, 115 Cal.Rptr.3d 89; *County of San Diego v. San Diego NORML, supra,* 165 Cal.App.4th at p. 826, 81 Cal.Rptr.3d 461.) While this statement of the purpose of the federal CSA is technically accurate,[FN28] it is inapplicable in the context of medical marijuana. This is because, as far as Congress is concerned, there is no such thing as medical marijuana. Congress has concluded that marijuana has no accepted medical use at all; it would not be on Schedule I otherwise. (*United States v. Oakland Cannabis Buyers' Cooperative, supra,* 532 U.S. at p. 491, 121 S.Ct. 1711.) Thus, to Congress, *all* use of marijuana is recreational drug use, the combating of which is admittedly the core purpose of the federal CSA.[FN29] This case presents the question of whether an ordinance which establishes *a permit scheme* for medical marijuana collectives stands as an obstacle to the accomplishment of this purpose. We conclude that it does.

[24][25] There is a distinction, in law, between not making an activity unlawful and making the activity lawful. An activity may be prohibited, neither prohibited nor authorized, or authorized. (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc., supra,* 41 Cal.4th at p. 952, 63 Cal.Rptr.3d 50, 162 P.3d 569.) When an act is prohibited by federal law, but neither prohibited nor authorized by state law, there is no obstacle preemption. The state law does not present an obstacle to Congress's purposes simply by not criminalizing conduct that Congress has criminalized. For this reason, the CUA is not preempted under obstacle preemption.[FN30] (*City of Garden Grove v. Superior Court, supra,* 157 Cal.App.4th at pp. 384–385, 68 Cal.Rptr.3d 656.) The CUA simply decriminalizes (under state law) the possession and cultivation of medical marijuana (*People v. Mower, supra,* 28 Cal.4th at p. 472, 122 Cal.Rptr.2d 326, 49 P.3d 1067); it does not attempt to authorize the possession and cultivation of the drug (*Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 926, 70 Cal.Rptr.3d 382, 174 P.3d 200).

[26] The City's ordinance, however, goes beyond decriminalization into authorization. Upon payment of a fee, and successful participation in a lottery, it provides *permits* to operate medical marijuana collectives. It then imposes an annual fee for their continued operation in the City. In other words, the City determines which collectives are permissible and which collectives are not, and collects fees as a condition of continued operation by the permitted collectives. A law which "authorizes [individuals] to engage in conduct that the federal Act forbids ... 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' " and is therefore preempted. (*Michigan Canners and Freezers Association, Inc. v. Agricultural Marketing and Bargaining Board* (1984) 467 U.S. 461, 478, 104 S.Ct. 2518, 81 L.Ed.2d 399.)

***12** The same conclusion was reached by the Oregon Supreme Court in *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries* (2010) 348 Or. 159, 230 P.3d 518. Oregon had enacted a medical marijuana statute which both affirmatively

authorized the use of medical marijuana and exempted its use from state criminal liability. (*Id.* at p. 525.) The court concluded that the law was preempted by the federal CSA, under obstacle preemption, to the extent that it authorized the use of medical marijuana rather than merely decriminalizing its use under state law. (*Id.* at p. 529–531.) We agree with that analysis.

[27] Additionally, we have taken judicial notice of letters which set forth the position of the U.S. Attorney General on the purposes of the CSA and the issue of obstacle preemption. While we do not simply defer to its position, we place "some weight" on it. (See *Geier v. American Honda Motor Company, Inc., supra,* 529 U.S. at p. 883, 120 S.Ct. 1913 [placing "some weight" on Department of Transportation's interpretation of its own regulations and whether obstacle preemption would apply].) On February 1, 2011, the U.S. Attorney for the Northern District of California sent a letter to the Oakland City Attorney relating to that city's consideration of a licensing scheme for medical marijuana cultivation and manufacturing. The letter explained, "Congress placed marijuana in Schedule I of the Controlled Substances Act (CSA) and, as such, growing, distributing, and possessing marijuana in any capacity, other than as part of a federally authorized research program, is a violation of federal law regardless of state laws permitting such activities." (U.S. Attorney Melinda Haag, letter to Oakland City Attorney John A. Russo, February 1, 2011.) It further stated, "The Department is concerned about the Oakland Ordinance's creation of a licensing scheme that permits large-scale industrial marijuana cultivation and manufacturing as it authorizes conduct contrary to federal law and threatens the federal government's efforts to regulate the possession, manufacturing, and trafficking of controlled substances." (*Ibid.*)

[28] On June 29, 2011, the Deputy Attorney General issued a memorandum to all United States Attorneys confirming the position taken in this letter and confirming that prosecution of significant traffickers of illegal drugs, including marijuana, "remains a core priority." (Deputy Attorney General James M. Cole, memorandum for all U.S. Attorneys, June 29, 2011.) The memorandum noted that several jurisdictions "have considered or enacted legislation to authorize multiple large-scale, privately-operated industrial marijuana cultivation centers," and noted that these activities are not shielded from federal enforcement action and prosecution. (*Ibid.*) In short, the federal government has adopted the position that state and local laws which license the large-scale cultivation and manufacture of marijuana stand as an obstacle to federal enforcement efforts.[FN31] We agree.

***13** The California State Association of Counties and League of California Cities suggest that, although the City's ordinance is phrased in the language of what it will "permit," it is, in truth, merely an identification of those collectives against which it will not bring violation proceedings, and is therefore akin to the CUA as a limited decriminalization. The ordinance cannot be read in that manner. First and foremost, it is the *possession of the permit itself,* not any particular conduct, which exempts a collective from violation proceedings. That is to say, the ordinance does not indicate that collectives complying with a list of requirements are allowed (or, perhaps, "not disallowed") to operate in the City, which then simply issues permits to identify the collectives in compliance. In this regard, the City's permit scheme is distinguishable from the voluntary identification card scheme set forth in the MMPA. A voluntary identification card identifies the holder as someone California has elected to exempt from California's sanctions for marijuana possession. (*County of San Diego v. San Diego NORML, supra,* 165 Cal.App.4th at pp. 825–826, 81 Cal.Rptr.3d 461.) One not possessing an identification card, but nonetheless meeting the requirements of the CUA, is also immune from those criminal sanctions. The City's permit system, however, provides that collectives with permits may collectively cultivate marijuana within the City *and those without permits may not.* The City's per-

mit is nothing less than an *authorization* to collectively cultivate.

Second, the City charges substantial application and renewal fees, and has chosen to hold a lottery among all qualified collective applicants (who pay the application fee) in order to determine those lucky few who will be granted permits. The City has created a system by which: (1) of all collectives which follow its rules, only those which pay a substantial fee may be considered for a permit; and (2) of all those which follow its rules and pay the substantial fee, only a randomly selected few will be granted the right to operate. The conclusion is inescapable: the City's permits are more than simply an easy way to identify those collectives against whom the City has chosen not to enforce its prohibition against collectives; the permits instead authorize the operation of collectives by those which hold them. As such, the permit provisions, including the substantial application fees and renewal fees, and the lottery system, are federally preempted.

c. *Severability*

Having concluded that the permit provisions of the City's ordinance are federally preempted, we turn to the issue of severability. The City's ordinance provides, "If any provision of this Chapter, or the application thereof to any person or circumstance, is held invalid, that invalidity shall not affect any other provision or application of this Chapter that can be given effect without the invalid provision or application; and to this end, the provisions or applications of this Chapter are severable." (Long Beach Mun.Code, ch. 5.87, § 5.87.130.)

***14** [29][30][31] This case is before us on a writ petition from the denial of a preliminary injunction. As we have concluded the permit provisions of the City's ordinance are preempted under federal law, the operation of those provisions should have been enjoined. The parties did not brief the issue of which, if any, of the other provisions of the ordinance must also be enjoined, and which can be severed and given independent effect. [FN32] Under the circumstances, we believe it is appropriate for the trial court to consider this issue in the first instance. However, we make the following observations: Several provisions of the City's ordinance simply identify prohibited conduct without regard to the issuance of permits. For example, the ordinance includes provisions (1) prohibiting a medical marijuana collective from providing medical marijuana to its members between the hours of 8:00 p.m. and 10:00 a.m. (Long Beach Mun.Code, ch. 5.87, § 5.87.090 at subd. H); (2) prohibiting a person under the age of 18 from being on the premises of a medical marijuana collective unless that person is a qualified patient accompanied by his or her physician, parent or guardian (*id.* at subd. I); and (3) prohibiting the collective from permitting the consumption of alcohol on the property or in its parking area (*id.* at subd. K). These provisions impose further limitations on medical marijuana collectives beyond those imposed under the MMPA, and do not, in any way, permit or authorize activity prohibited by the federal CSA. As such, they cannot be federally preempted, and appear to be easily severable.

[32] Other provisions of the ordinance could be interpreted to simply impose further limitations, although they are found in sections relating to the issuance of permits. For example, in order to obtain a medical marijuana collective permit, an applicant must establish that the property is not located in an exclusive residential zone (Long Beach Mun.Code, ch. 5.87, § 5.87.040, subd. A), and not within a 1,500 foot radius of a high school or 1,000 foot radius of a kindergarten, elementary, middle, or junior high school (*id.* at subd. B). These restrictions, if imposed strictly as a limitation on the operation of medical marijuana collectives in the City, would not be federally preempted. However, the restrictions, as currently phrased, appear to be a part of the preempted permit process. We leave it to the trial court to determine, in the first instance, whether these and other restrictions can be interpreted to stand alone in the absence of the City's permit system, and therefore not conflict with the federal CSA. [FN33] It is also for the trial court to consider

whether any provisions of the City's ordinance that are not federally preempted impermissibly conflict with state law, to the extent plaintiffs have appropriately pleaded (or can so plead) the issue.

DISPOSITION

The petition for writ of mandate is granted. The matter is remanded to the trial court for further proceedings consistent with the views expressed in this opinion. The petitioners shall recover their costs in this proceeding.

WE CONCUR: KLEIN, P.J., and ALDRICH, J.

FN1. The CSA uses both the spellings, "marihuana" and "marijuana." We use the latter.

FN2. Health and Safety Code section 11357 prohibits the possession of marijuana, although possession of not more than 28.5 grams is declared to be an infraction, punishable by a fine of not more than $100. (Health & Saf.Code, § 11357, subd. (b).)

FN3. "Primary caregiver" is defined by the CUA to mean "the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person." (Health & Saf.Code, § 11362.5, subd. (e).)

FN4. Although the MMPA added examples to the definition of "primary caregiver," it retained the restrictive definition set forth in the CUA. (Health & Saf.Code, § 11362.7, subd. (d).) Thus, a person who supplies marijuana to a qualified patient is not an immune primary caregiver under the CUA and MMPA unless the person consistently provided caregiving, *independent of assistance in taking marijuana* at or before the time the person assumed responsibility for assisting the patient with medical marijuana. In short, a person is not a primary caregiver simply by being designated as such and providing the patient with medical marijuana. (*People v. Hochanadel* (2009) 176 Cal.App.4th 997, 1007, 98 Cal.Rptr.3d 347.)

FN5. The statutory language provides that the card "identifies a person authorized to engage in the medical use of marijuana." (Health & Saf.Code, § 11362.71, subd. (d)(3).) It would be more appropriate to state that the card "identifies a person whose use of marijuana is decriminalized." As we discussed above, the CUA simply *decriminalized* the medical use of marijuana; it did not *authorize* it.

FN6. A city or county may also enact a guideline allowing patients to exceed the statutory limitation. (Health & Saf.Code, § 11362.77, subd. (c).)

FN7. We note that this provision also speaks in the language of permission, rather than decriminalization. The MMPA does not state that the possession of eight ounces of dried marijuana by a qualified patient is immune from arrest and prosecution; rather, it states that a qualified patient "may possess" no more than eight ounces of dried marijuana. The plaintiffs in this case make no argument that the MMPA is preempted by the CSA for this reason.

FN8. This provision was held to constitute an improper amendment of the CUA to the extent that it burdens a criminal defense under the CUA to a criminal charge of possession or cultivation. (*People v. Kelly* (2010) 47 Cal.4th 1008, 1012, 103 Cal.Rptr.3d 733, 222 P.3d 186.) The Supreme Court did not void the provision in its entirety, however, as it has other purposes, such as its creation of a safe harbor for qualified patients possessing no more

than the set amounts. (*Id.* at pp. 1046–1049, 103 Cal.Rptr.3d 733, 222 P.3d 186.)

FN9. The Legislature has passed, and the Governor has approved, an amendment to this section. The statute amends this section to read as follows: "Nothing in this article shall prevent a city or other local governing body from adopting and enforcing any of the following: (a) Adopting local ordinances that regulate the location, operation, or establishment of a medical marijuana cooperative or collective. (b) The civil and criminal enforcement of local ordinances described in subdivision (a). (c) Enacting other laws consistent with this article." (Stats.2011, ch. 196, § 1.) While this new statute clarifies the state's position regarding local regulation of medical marijuana collectives, it has no effect on our federal preemption analysis.

FN10. The subdivision provides, in full, "This section shall apply 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 business license." Again, the MMPA speaks of collectives "authorized by law to possess, cultivate, or distribute medical marijuana," when, in fact, the operative part of the MMPA simply provides that qualified patients and their caregivers shall not "be subject to state criminal sanctions" under enumerated statutes for their collective medical marijuana activities. (Health & Saf.Code, § 11362.775.)

FN11. The Guidelines confirm that the Board of Equalization taxes medical marijuana transactions, and requires businesses transacting in medical marijuana to hold a seller's permit. This does not "allow individuals to make unlawful sales, but instead merely provides a way to remit any sales and use taxes due." (Guidelines, *supra,* at p. 2.)

FN12. The Guidelines agree that California case authority has concluded that the CUA and MMPA are not preempted by the federal CSA. "Neither [the CUA], nor the MMP[A], conflict with the CSA because, in adopting these laws, California did not 'legalize' medical marijuana, but instead exercised the state's reserved powers to not punish certain marijuana offenses under state law when a physician has recommended its use to treat a serious medical condition." (Guidelines, *supra,* at p. 3.)

FN13. The Guidelines recommend that state and local law enforcement officers "not arrest individuals or seize marijuana under federal law when the officer determines from the facts available that the cultivation, possession, or transportation is permitted under California's medical marijuana laws." (Guidelines, *supra,* at p. 4.)

FN14. The Guidelines were issued in 2008. When the Legislature amended the MMPA in 2010 to provide that collectives could not be located within 600 feet of a school, the restriction expressly applied to dispensaries as well as collectives and cooperatives. (Health & Saf.Code, § 11362.768, subd. (b).)

FN15. The ordinance expressly provides that it applies to collectives existing at the time of its enactment. No such collective could continue operation without a permit. (Long Beach Mun.Code, ch. 5.87, § 5.87.080.)

FN16. There is no provision in the ordin-

ance for a lottery system. To the contrary, the ordinance provides that if the applicant demonstrates compliance with all of the requirements, a permit "shall [be] approve[d] and issue[d]." (Long Beach Mun.Code, ch. 5.87, § 5.87.040.) No argument is made that the lottery system is improper on this basis.

FN17. "The camera and recording system must be of adequate quality, color rendition and resolution to allow the ready identification of an individual on or adjacent to the Property. The recordings shall be maintained at the Property for a period of not less than thirty (30) days." (Long Beach Mun.Code, ch. 5.87, § 5.87.040, subd. I.) According to an amicus curiae brief filed by the American Civil Liberties Union (ACLU) and other entities, the ordinance was amended in 2011 to add a requirement that full-time video monitoring of a collective be made accessible to the Long Beach Police Department in real time without a warrant, court order, or other authorization.

FN18. In plaintiffs' brief in reply to the amicus curiae briefing, plaintiffs suggest that the restrictions imposed by the permit system are so onerous, the only collectives that could conceivably obtain permits are large-scale dispensaries. We do not entirely disagree. One can assume that a small collective of four patients and/or caregivers growing a few dozen marijuana plants would lack the resources to: (1) pay a $14,742 application fee; (2) pay a $10,000 annual fee; (3) install necessary insulation, ventilation, closed-circuit television, fire, and alarm systems; and (4) regularly have its marijuana tested by an independent laboratory. Moreover, the location restrictions, which prohibit any collective in an exclusive residential zone or within 1000 feet of another collective (Long Beach Mun.Code, ch. 5.87, § 5.87.040, subds. A & C) might also be prohibitive for small, private collectives. Nonetheless, plaintiffs' complaint did not challenge the ordinance on this basis. We do note, however, that these provisions of the ordinance make it somewhat more likely that the only collectives permitted in Long Beach will be large dispensaries that require patients to complete a form summarily designating the business owner as their primary caregiver and offer marijuana in exchange for cash "donations"—the precise type of dispensary believed by the Attorney General likely to be in violation of California law.

FN19. While not alleged in plaintiffs' complaint, it was suggested that this language prohibits the *personal* cultivation of medical marijuana, outside the context of a collective. Indeed, in plaintiffs' petition, they argue that the City's ordinance is preempted by *state* law because of this prohibition. At argument before the trial court, however, the City Attorney represented that the ordinance did not criminalize personal cultivation and possession, and addressed only collective cultivation. As the City has represented that the ordinance does not apply to prohibit personal cultivation and possession, and there is no evidence that it has been so applied, we do not address the argument.

FN20. Plaintiffs, who were members of collectives shut down due to noncompliance with the ordinance, suggest that, since they can each be a member of only a single collective, they are now foreclosed from obtaining medical marijuana from another collective. This is clearly untrue. Membership is limited to a single *permitted* collective. Since the collectives in which

plaintiffs were members were not permitted, they may join another, permitted, collective without violating the terms of the ordinance.

FN21. The trial court apparently had before it two cases challenging the City's ordinance. Although it did not consolidate the cases or deem them related, it heard the preliminary injunction issue simultaneously in both cases, and denied the preliminary injunction in both cases in a single order. The other case had raised the issue of whether the ordinance impermissibly conflicted with the CUA and MMPA. The court concluded that it did not, although it noted that the "overall sense of the Ordinance is inconsistent with the purposes of the CUA and MMPA." (Emphasis omitted.)

FN22. We take judicial notice of the fact that a simple Google search reveals that several other medical marijuana dispensaries are apparently operating in Long Beach, although their websites do not specifically indicate whether they are permitted.

FN23. We sought briefing from the parties and amici on the issue of whether certain record-keeping requirements imposed by the ordinance violated collective members' Fifth Amendment rights. Given our resolution of the federal preemption issue, we need not reach the Fifth Amendment issue, although it may be considered by the trial court upon remand.

FN24. That City is a charter city makes no difference to our analysis. As a charter city, City's ordinances relating to matters which are *purely municipal affairs* prevail over state laws on the same subject. (*Home Gardens Sanitary Dist. v. City of Corona* (2002) 96 Cal.App.4th 87, 93, 116 Cal.Rptr.2d 638). The issue, however, is one of conflict with *federal law* on a matter on which the federal government has chosen to act in the national interest. Indeed, the United States Supreme Court has held that the federal CSA applies to marijuana cultivated and used *solely intrastate,* as a proper exercise of Congress's authority under the Commerce Clause. (*Gonzales v. Raich, supra,* 545 U.S. at pp. 29–30, 125 S.Ct. 2195.) While City suggests that its ordinance relates to the purely municipal matters of zoning and land use, it is clear that the regulation of medical marijuana is a matter of state and, indeed, national interest, and the ordinance is thus not concerned *solely* with municipal affairs.

FN25. The trial court in this case did not reach the issue, concluding that plaintiffs were barred by the doctrine of unclean hands from arguing that the federal CSA preempted the City's ordinance because the plaintiffs sought the ruling in order to continue to violate the federal CSA. We disagree. Plaintiffs sought the assistance of the California courts in order to assert their rights to use medical marijuana under the California statutes. As the CUA and MMPA decriminalize medical marijuana use in California, plaintiffs' hands were not unclean under California law. Furthermore, if the only individuals who can challenge medical marijuana ordinances as preempted by federal law are those who have no intention of violating the provisions of federal law, no one would ever have standing to raise the preemption argument.

FN26. The federal CSA defines "distribution" to include "delivery," (21 U.S.C. § 802(11)), which, in turn, includes the "transfer" of a controlled substance (21 U.S.C. § 802(8)).

FN27. There may also be an issue of whether the ordinance *requires* certain City officials to violate federal law by aiding and abetting (or facilitating (21 U.S.C. § 843(b))) a violation of the federal CSA. For example, the ordinance requires the City's Director of Financial Management to approve and issue a permit if certain facts are demonstrated. (Long Beach Mun.Code, ch. 5.87, § 5.87.040.) In this regard, we note that the Ninth Circuit has held that a physician does not aid and abet the use of marijuana in violation of the federal CSA simply by *recommending* that the patient use marijuana, but the conduct would escalate to aiding and abetting if the physician provided the patient with the means to acquire marijuana with the specific intent that the patient do so. (*Conant v. Walters, supra,* 309 F.3d at pp. 635–636.) We also note that the U.S. Attorneys for the Eastern and Western Districts of Washington took the position, in a letter to the Governor of Washington, that "state employees who conducted activities mandated by the Washington legislative proposals [which would establish a licensing scheme for marijuana growers and dispensaries] would not be immune from liability under the CSA." (U.S. Attorney Jenny A. Durkan and U.S. Attorney Michael C. Ormsby, letter to Governor Christine Gregoire, April 14, 2011.) Although a California court has concluded that law enforcement officials are not violating the federal CSA by returning confiscated medical marijuana pursuant to state law (*City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 355, 368, 68 Cal.Rptr.3d 656), we are not as certain that the federal courts would take such a narrow view. (See, also, *County of Butte v. Superior Court* (2009) 175 Cal.App.4th 729, 742, 96 Cal.Rptr.3d 421 (dis. opn. of Morrison, J., [stating "[f]ostering the cultivation of marijuana in California, regardless of its intended purpose, violates federal law"]).) We are not required to reach the issue.

FN28. In *Gonzales v. Oregon, supra,* 546 U.S. 243, 126 S.Ct. 904, the Supreme Court was concerned with an attempt by the Attorney General, purportedly acting under the federal CSA, to prohibit doctors from prescribing Schedule II drugs for use in physician-assisted suicide, as permitted by Oregon state law. The court concluded that the federal CSA was concerned with regulating medical practice insofar as it barred doctors from using their prescription-writing powers as a means to engage in illicit drug use, but otherwise had no intent to regulate the practice of medicine. (*Id.* at pp. 269–270, 126 S.Ct. 904.)

FN29. Indeed, in light of the Supreme Court's conclusions that: (1) "[A] medical necessity exception for marijuana is at odds with the terms of the [federal CSA]" (*United States v. Oakland Cannabis Buyers' Cooperative, supra,* 532 U.S. at p. 491, 121 S.Ct. 1711); and (2) the federal CSA reaches even purely intrastate cultivation and use of marijuana (*Gonzales v. Raich, supra,* 545 U.S. at p. 9, 30, 125 S.Ct. 2195), we see no legal basis for suggesting that the federal CSA's core purposes do not include the control of medical marijuana.

FN30. *Qualified Patients Assn. v. City of Anaheim, supra,* 187 Cal.App.4th at p. 757, 115 Cal.Rptr.3d 89, concluded that the MMPA also was not preempted by the CSA because it simply decriminalizes for the purposes of state law certain conduct related to medical marijuana. The court, however, was not presented with any argument that any specific sections of the MMPA go beyond decriminalization into authorization. As we noted above (see footnotes 5, 7, and 10, *ante*), the MMPA

sometimes speaks in the language of authorization, when it appears to mean only decriminalization. Obviously, any preemption analysis should focus on the purposes and effects of the provisions of the MMPA, not merely the language used. (See *Willis v. Winters* (2010) 235 Or.App. 615, 234 P.3d 141, 148 [Oregon's concealed weapon licensing statute is, in effect, merely an exemption from criminal liability], *aff'd* (2011) 350 Or. 299, 253 P.3d 1058.)

FN31. We again note that the high costs of compliance with the City's ordinance may have the practical effect of allowing *only* large-scale dispensaries, rather than small collectives. (See footnote 18, *ante.*) Yet these large-scale dispensaries are precisely the type of dispensaries the licensing of which the U.S. Attorney General believes stands as an obstacle to the enforcement of the CSA.

FN32. In their reply brief, petitioners argue that, as the entire ordinance is designed to regulate and permit medical marijuana collectives, the federally preempted provisions cannot be severed from other provisions. The City did not brief the severability issue at all.

FN33. The ordinance also includes record-keeping provisions as a condition of obtaining a permit. (Long Beach Mun.Code, ch. 5.87, § 5.87.040, subd. S.) Other record-keeping provisions appear unconnected to the permit requirement. (Long Beach Mun.Code, ch. 5.87, § 5.87.060.) Although we requested briefing on the issue of whether the record-keeping provisions violated the Fifth Amendment privilege against self-incrimination, the trial court will first have to determine, as a preliminary matter, whether each of the comprehensive record-keeping provisions can stand in the absence of the permit provisions.

Cal.App. 2 Dist.,2011.
Pack v. Superior Court
--- Cal.Rptr.3d ----, 199 Cal.App.4th 1070, 2011 WL 4553155 (Cal.App. 2 Dist.), 11 Cal. Daily Op. Serv. 12,643, 2011 Daily Journal D.A.R. 15,028

END OF DOCUMENT