Court of Appeal, Second Appellate District, Division Three

EMILY WHEELER,

Petitioner,

vs.

APPELLATE DIVISION OF THE SUPERIOR COURT OF LOS ANGELES,

Respondent

PEOPLE OF THE STATE OF CALIFORNIA,

Real Party In Interest.

On Appeal From Los Angeles County Superior Court

Hon. Comm. H. Elizabeth Harris (Case No. 9CJ00315-02)

APPLICATION FOR PERMISSION TO FILE AMICI CURIAE BRIEF AND AMICI BRIEF IN SUPPORT OF RESPONDENT CITY OF LOS ANGELES

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

This is the initial certificate of interested entities or persons submitted on behalf of Amicus Curiae League of California Cities and California State Association of Counties in the case number listed above.

The undersigned certifies that there are no interested entities or persons that must be listed in this certificate under California Rules of Court, rule 8.208.

Dated: August 12, 2021 BEST BEST & KRIEGER LLP

By: */s/* Jeffrey V. Dunn
JEFFREY V. DUNN
Attorneys for Amicus Curiae League of California Cities and California State Association of Counties

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE PRESIDING JUSTICE:

Pursuant to California Rules of Court, Rule 8.200, subdivision (c), League of California Cities (Cal Cities) and the California State Association of Counties (CSAC) (collectively, "amici") respectfully apply to this Court for permission to file the amicus curiae brief accompanying this application in support of The People of the State of California.

The brief of the amici will assist the Court by addressing the erosion of constitutional municipal police power authority that will likely result if the Court were to adopt Petitioner's preemption arguments. The brief concerns the local government's constitutional police power authority that municipalities and counties have to protect the public health, safety and welfare, and that police power authority includes the power to enforce.

Well-established law holds that there is no state law preemption of the constitutional power authority and its enforcement unless the Legislature has clearly indicated its intent to remove the authority. (*T-Mobile West LLC. v. City and County of San Francisco* (2019) 6 Cal.5th 1107, 1167-17.) Our Supreme Court has upheld this municipal police power authority against state law preemption arguments in *Inland Empire Patients Health & Wellness Center, Inc. v. City of Riverside* (2013) 56 Cal.4th 729 (*City of Riverside*), and the City of Los Angeles' criminal enforcement of its cannabis facility municipal code provisions is similarly not subject to state law preemption. The amici curiae brief advances

arguments on why the City's enforcement of its cannabis prohibitions are not preempted by state law.

For the reasons stated in this application and further developed in the proposed amici brief, the League of California Cities and CSAC respectfully request leave to file the amici curiae brief with this application.

The application and amicus curiae brief were authored by Jeffrey V. Dunn No person or entity made a monetary contribution to its preparation and submission.

Dated: August 12, 2021 Respectfully submitted,

By:/s/ Jeffrey V. Dunn
JEFFREY V. DUNN
Attorneys for Amici Curiae
League of California Cities and
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Counties

INTEREST OF THE AMICI CURIAE

The amici are as follows:

The League of Cities (CalCities) is an association of 478 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. CalCities is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this state law preemption case as having such significance because a finding of preemption would have a wide, sweeping effect on cities throughout the state.

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsel's Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

While many cities and counties have chosen to ban cannabis activities outright, others have chosen to issue licenses but still prohibit unlicensed cannabis activities through their own municipal codes. A finding that state law preempts the Los Angeles Municipal Code (LAMC) provisions at issue would directly jeopardize local governments' ability to

regulate cannabis within their borders. It is vital that cities and counties maintain their constitutional police power authority to enforce their own laws regarding cannabis and this case is particularly important to amici curiae because local cannabis regulation varies. (*City of Riverside,* 56 Cal.4th at p. 755 ["The presumption against preemption is additionally supported by the existence of significant local interests that may vary from jurisdiction to jurisdiction. Amici curiae League of California Cities et al. point out that 'California's 478 cities and 58 counties are diverse in size, population, and use.' As these amici curiae observe, while several California cities and counties allow medical marijuana facilities, it may not be reasonable to expect every community to do so."].)

As our Supreme Court has recognized, each city and county has a unique interest in regulating cannabis, and a holding of state law preemption of the Los Angeles Municipal Code provisions would in effect, invalidate criminal penalties imposed in the municipal codes of all cities and counties throughout California.

Petitioner's legal arguments threaten to undermine local government constitutional police power authority to control cannabis distribution facilities. In reliance upon *City of Riverside* and other applicable law, cities and counties have enforced marijuana distribution facility regulations to protect the public safety, health and welfare. By recognizing that there is no state law preemption of the City's criminal enforcement of the City's cannabis facility regulation, the Court upholds constitutional, statutory and case law thereby supporting the amici's interest in ensuring the certainty of municipal police power authority. Therefore, the amici have a significant interest in the issues presented in the appeal.

SUMMARY OF ARGUMENT

Municipalities have constitutional police power enforcement authority unless the Legislature has clearly indicated its intent to remove that authority. Here, there is no such clear legislative intent and instead, the Legislature has recognized that local governments have authority to enact and enforce ordinances regulating cannabis distribution facilities. (Bus. & Prof. Code, § 26200; *City of Riverside*, 56 Cal.4th 729.)

The city and county constitutional police power authority to regulate necessarily includes the power to enforce. (Cal.Const. art. XI, sec. 7.) Thus, a local government's civil or criminal enforcement of its land use authority is as broad as its exercise of the police power regulatory authority.

California's Controlled Substances Act (CSA) does not preempt the constitutional police power authority of cities and counties to enact and enforce both civilly and criminally municipal cannabis regulations. The CSA does not prohibit enforcement of city and county cannabis facility regulations. If the CSA were construed otherwise, cities and counties would be deprived of their ability to protect public health and safety.

If the California Legislature had intended to so usurp municipal police power authority, it would have spoken clearly on the subject, and no such clarity appears in either the CSA or in any of the subsequent marijuana statutes that allow for municipal regulations. On the contrary, the Legislature has repeatedly affirmed municipal police power authority to regulate cannabis facilities and enforce such regulations thus, there cannot be state law preemption in this case. (*See City of Vallejo v. NCORP4, Inc.* (2017) 15 Cal.App.4th 1078-1082 ["Proposition 64 expressly provides that

state regulations do not 'limit the authority of a local jurisdiction to adopt **and enforce** local ordinances to regulate' marijuana dispensaries "or to completely prohibit' their "establishment or operation'" quoting and citing Bus. & Prof. Code § 26200 [emphasis added].)

Petitioner's preemption contentions are inconsistent with the California Supreme Court's decision in *City of Riverside* and numerous Court of Appeal decisions holding that there is no state law preemption of city and county police power authority to establish cannabis facility regulations and enforce to enforce the regulations. (*E.g.*, *The Kind and Compassionate v. City of Long Beach* (2016) 2 Cal.App.5th 1116; *Safe Life Caregivers v. City of Los Angeles* (2016) 243 Cal.App.4th 1029; *Maral v. City of Live Oak* (2013) 221 Cal.App.4th 975; *Conejo Wellness Center, Inc. v. City of Agoura Hills* (2103) 214 Cal.App.4th 1534; *Browne v. County of Tehama* (2013) 213 Cal.App.4th 704; *County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861, *City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153.)

The amici's members and constituents, enact and enforce ordinances regulating cannabis facilities. The enforcement by criminal and civil means is needed for the protection of public health and safety. (*People v. Gonzalez* (2021) 53 Cal.App.5th Supp. 1.) This is especially true here with the City of Los Angeles and its enactment and enforcement of Municipal Code section 104.15 – the challenged municipal code provision in this case. (*Id*., at pp. 12-14.)

Local governments depend upon their ability to enforce their ordinances. If, as Petitioner contends, cities and counties cannot enforce their cannabis regulations in criminal court proceedings then amici's

members ability to protect public safety is significantly impaired. Therefore, this Court should deny the petition.

ARGUMENT

I. THERE IS NO STATE LAW PREEMPTION OF THE CITY'S ENFORCEMENT OF ITS CANNABIS LAND USE REGULATIONS.

A. The Question As To Preemption Is Whether The Legislature Has Removed The Constitutional Police Power Authority To Regulate Cannabis Distribution Properties.

The general principles governing state law preemption are explained in *City of Riverside*, 56 Cal.4th at pp. 743-44: "Under article XI, section 7 of the California Constitution '[a] county or city may make **and enforce** within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.'" (Emphasis added.) It bears emphasis that our Supreme Court has held that that a city's police powers under article XI, section 7 of the California Constitution are "as broad as the police powers exercisable by the Legislature itself." (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 140 [emphasis added].) If the Legislature has the power to regulate a certain area, municipalities have the power to regulate that same area. (*California Rifle & Pistol Assn v. City of West Hollywood* (1988) 66 Cal.App.4th 1302, 1310.) The issue is not whether the City is constitutionally authorized to regulate cannabis distribution properties and enforce the regulation within its boundaries but whether the Legislature has acted to remove that power from the City. (*Id*; *see also Sprint PCS Assets, LLC v. City of Palos Verdes Estates* (2009) 583 F.3d 716, 722 ["Thus, the threshold issue is not, as Sprint argues and the district

court apparently believed, whether the PUC authorizes the City to consider aesthetics in deciding whether to grant a WCF permit application, but is instead whether the PUC divests the City of its constitutional power to do so."].) As shown below, the Legislature has not removed the constitutional police power of cities and counties to regulate cannabis distribution properties; and the Legislature has recognized that cities and counties have authority to enact and enforce their marijuana facility regulations.

B. Courts Have Repeatedly Held That There Is No Preemption In An Area Where Local Government Traditionally Regulates Unless The Legislature Clearly Indicates That It Is Taking Away The Police Power Authority

"[W]hen a local government regulates in an area over which it traditionally exercised control, such as the location of particular land uses, California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is not preempted by state statute." (*City of Riverside*, 56 Cal.4th at pp. 742; *Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1169 quoting *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149 original].") "Land use regulation in California historically has been a function of local government under the grant of police power contained in article XI, section 7.... We have recognized that a city's or county's power to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state.' " (*City of Riverside*, at pp. 742-43 quoting *Big*

Creek Lumber Co. v. County of Santa Cruz (2006) 38 Cal.4th 1139, 1151, fn. omitted.)

The "starting point" of the court's analysis is "'the strong presumption that legislative enactments' must be upheld unless their constitutionality clearly, positively, and unmistakably appears.'" (*People v. Gonzalez* (2020) 53 Cal.App.5th Supp. 1, 7-8 quoting *Williams v. Garcetti* (1993) 5 Cal.4th 561, 568 [citations omitted].) This is particularly true with local governments' enforcement of their regulations concerning marijuana distribution facilities. Therefore our Supreme Court has held that courts must presume, absent a clear indication to the contrary, that city and county regulation and its enforcement of its cannabis regulations are not preempted by state law because there are significant local interests that could vary by jurisdiction, giving rise to a presumption against preemption. (*T-Mobile West LLC v. City and County of San Francisco*, *supra*, 6 Cal.5th at p. 1123; *City of Riverside*, 5 Cal.4th at p. 755.)

Here, the court presumes, absent a clear indication to the contrary, that the City of Los Angeles cannabis regulations are not preempted by state law.

C. The Legislature Has Not Clearly Taken Away City And County Police Power Authority To Make And Enforce Regulations Concerning Cannabis Distribution Facilities

In determining whether the Legislature has clearly removed municipal people power authority to make and enforce cannabis distribution facility regulations, an examination of California's cannabis

laws shows no state law preemption post *O'Connell v. City of Stockton* (2007) 41 Cal.4th. 1061.

In 1996, California voters approved a ballot initiative, Proposition 215, referred to as the "Compassionate Use Act" (Health & Safety Code § 11362.5) (CUA).

The CUA was narrow in scope. (*Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 929–930; *Kruse*, *supra*, 177 Cal.App.4th at p. 1170).) The CUA provided a limited defense from prosecution for cultivation and possession of marijuana for purported medicinal uses. It did not create a statutory or constitutional right to obtain marijuana or allow the sale or nonprofit distribution of marijuana. (*Ross* at p. 926, *Kruse*, at pp. 1170–1171; *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 773–774.)

In 2003, the Legislature enacted the Medical Marijuana Program ("MMP") (§§ 11362.7-11362.83). The MMP was to " '[promote] uniform and consistent application of the [Compassionate Use Act of 1996] among the counties within the state' and '[enhance] the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects.' [Citation.]" (*County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861, 864.)

Although the MMP provided a new affirmative defense to certain medical marijuana users for certain criminal liability, Health and Safety Code section 11362.768 of the MMP, as amended in 2011, clarifies that cities and counties have authority to enact and criminally enforce their local ordinances regulating marijuana distribution facilities: "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." This section originally stated: "Nothing in this article shall prevent a city or other local governing body from adopting and enforcing laws consistent with this article." (Stats. 2011, c. 196 (A.B. 1300) [emphasis added].)

In *County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861, 867-68, the Court of Appeal stated that "[i]f there was any ever doubt about the Legislature's intention to allow local governments to regulate marijuana dispensaries, and we do not believe there was, the newly enacted section 11362.768, has made clear that local government may regulate dispensaries."

On November 8, 2016, California voters passed as an initiative measure the Control, Regulate and Tax Adult Use of Marijuana Act, more commonly known as Proposition 64. (*People v. Boatwright* (2019) 36 Cal.App.5th 848, 853.) Proposition 64 legalized adult, recreational use of marijuana and reduced the criminal penalties for various offenses involving marijuana, including its cultivation and possession for sale. (*Boatwright, supra*, at p. 853.)

Proposition 64 added section 26200 to the Business and Professions Code which, in relevant part, provides additional and clear legislative intent to allow municipalities to enact and enforce by criminal proceedings local government marijuana facilities and operations:

> (a)(1) This division shall not be interpreted to supersede or limit the authority of a local jurisdiction to adopt and enforce local ordinances to regulate businesses licensed under this division, including, but not limited to, local zoning and land use requirements, business license requirements, and requirements related to reducing exposure to secondhand smoke, or to completely prohibit the establishment or operation of one or more types of businesses licensed under this division within the local jurisdiction.
>
> (2) This division shall not be interpreted to supersede or limit existing local authority for law enforcement activity, enforcement of local zoning requirements or local ordinances, or enforcement of local license, permit, or other authorization requirements.
>
> . . .
>
> (f) This division, or any regulations promulgated thereunder, shall not be deemed to limit the authority or remedies of a city, county, or city and county under any provision of law, including, but not limited to, Section 7 of Article XI of the California Constitution.

The Legislature's clear intent to allow local governments to enact and enforce cannabis regulations under Business and Professions Code Section 26200was recently recognized by the Court of Appeal in *City of Vallejo, supra*, 15 Cal.App.5th 1078, 1081-82:

> In 2016, the voters approved Proposition 64 legalizing marijuana for recreational use by adults, subject to various conditions. (See, e.g., Health & Saf. Code, §§ 11358-11359.) While

> permitting the use of marijuana, California law "does not thereby mandate that local governments authorize, allow, or accommodate the existence of" marijuana dispensaries. (*City of Riverside, supra*, 56 Cal.4th at p. 759, 156 Cal.Rptr.3d 409, 300 P.3d 494.) " 'Land use regulation in California historically has been a function of local government.' " (*Id*. at p. 742, 156 Cal.Rptr.3d 409, 300 P.3d 494.) "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const., art. XI, § 7.) State law permitting medicinal marijuana use and distribution does not preempt the authority of California cities and counties, under their traditional land use and police powers, to allow, restrict, limit, or entirely exclude facilities that distribute medical marijuana, and to enforce such policies by nuisance actions." (*City of Riverside, supra*, at p. 762, 156 Cal.Rptr.3d 409, 300 P.3d 494.)
>
> The same principle applies to recreational marijuana use, as Proposition 64 expressly provides that state regulations do not "limit the authority of a local jurisdiction to adopt and enforce local ordinances to regulate" marijuana dispensaries "or to completely prohibit" their "establishment or operation." (Bus. & Prof. Code, § 26200, subd. (a)(1).)

(See also *County of Kern v. Alta Sierra Holistic Exchange Service* (2020) 46 Cal.App.5th 82, 106 [upholding local government police power

authority to enact and enforce cannabis regulations under Business and Professions Code Section 26200].)[1]

D. The Constitutional Police Power Authority To Regulate Includes The Power To Enforce By Criminal And Civil Means To Protect Public Health and Safety

Cities and counties have traditionally regulated land uses and more recently cannabis distribution facilities including prohibiting their operation. With the power to regulate comes the power to enforce and cities have enforced their police power authority by both civil and criminal means. (*People v. Gonzalez*, *supra*, 53 Cal.App.5th Supp. at pp. 11-13.)

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[1] After the passage of Proposition 64, the Governor signed the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA), Business and Professions Code section 2600 et seq,, as amended by Stats 2017, ch. 27, section 4, into law on June 27, 2017. It repealed the Medical Marijuana Regulation and Safety Act and created one regulatory system for both medicinal and adult use marijuana. The new act explicitly authorized local jurisdictions "to complete prohibit the establishment or operation of one more types of businesses licensed under [MAUCRSA] within the local jurisdiction." (Bus. & Prof. Code, § 26200, subd. (a)(1); see *County of Kern v. Alta Sierra Holistic Exchange Service*, *supra*, 46 Cal.App.5th at p. 106.)

"[I]t is commonly the case that with regard to public welfare offenses, a legislative body will intend guilt can be proved without any proof of scienter or wrongful intent." (*People v. Gonzalez*, *supra*, 53 Cal.App.5th Supp. at p. 12 quoting *In re Jorge M.* (2000) 23 Cal.4th 866, 872.) "Such offenses are based upon the violation of statutes which are purely regulatory in nature and involve widespread injury to the public. (*Id*.) "Under many statutes enacted for the protection of the public health and safety, e.g., traffic and food and drug regulation, criminal sanctions are relied upon even if there is no wrongful intent." (*Id*., quoting *In re Jennings* (2004) 34 Cal.4th 254, 267.)

Here, City of Los Angeles Ordinance No. 185, 343, section 1 provides, "Without comprehensive (cannabis) regulations, consumers in the City were vulnerable to the dangers in ingesting and using a substance that was not subject to basic rules of safety for ingestible substances. . . . Further, *unregulated cannabis businesses remain a source of danger for unsuspecting neighbors when fires or other catastrophes were intended to be an integral part of a comprehensive regulatory scheme involving cannabis establishments in the City*." (Emphasis added; see also (*People v. Gonzalez*, *supra*, 53 Cal.App.5th Supp. at p. 12 [same upholding LAMC 104.15 strict liability provision as against constitutional vagueness challenges.].)

Cities regularly rely on their police power to ensure the health and safety of their residents through housing and building codes. Among other things, localities enforce against housing conditions like hazardous electrical wiring or plumbing, inadequate heat, or lack of fire extinguishers and smoke detectors. (See, e.g. *City and County of San Francisco v. Sainez*

(2000) 77 Cal.App.4th 1302, 1306 [enumerating the many violations of state and local building and housing codes that resulted in an enforcement action].) By seeking civil and criminal penalties for violations of housing and building codes, cities protect vulnerable tenants from abusive, profit-driven landlords, and encourage compliance with the building codes. (*Sainez*, 77 Cal. App. 4th at 1315.) In *Sainez*, a long term, sixty-five-year-old tenant and her husband suffered continuous bouts of illness from an unheated apartment, a condition that went unabated despite the tenants repeated complaints. (*Sainez*, 77 Cal. App. 4th at 1316.) Such criminal penalties not only serve the purpose of curtailing the culpable conduct, but also provide cities with funding to continue to enforce the housing and building codes. (*Sainez*, 77 Cal. App. 4th at 1315 [noting that the penalty "of course, is paid to the City's treasury and in part funds code enforcement efforts"].)

E. Cities And Counties Must Be Able To Enforce Their Police Power Authority As Against Cannabis Facilities In Violation Of Municipal Code Regulations

In *County of Oakland v. Superior Court* (1996) 45 Cal.App.4th 740, 767, the Court of Appeal held that many local government regulatory ordinances have a direct impact on the enforcement of state laws that have been enacted to preserve the health, safety and welfare of state and local citizens but that deprive a local entity of the power to enact them:

> As the California Supreme Court has ruled, local governments have a legitimate need to address problems generated by business

> involvement in activities that may be inimical to the health, welfare and safety of the community. (Cohen v. Board of Supervisors, supra, 40 Cal.3d at p. 298.) State requirements may be inadequate to meet the demands of densely populated cities. Thus, it became proper and necessary for local government to act according to its unique needs. (Ibid.; Daniel v. Board of Police Commissioners, supra, 190 Cal.App.2d at p. 571; see Bravo Vending v. City of Rancho Mirage, supra, 16 Cal.App.4th at p. 411.) For this reason, a local entity may properly determine that a particular business fosters, profits from and provides an environment for activities proscribed by state law. For example, an ordinance is not transformed into a statute prohibiting crime simply because the city uses its police powers to discourage illegal activities associated with certain businesses. Many regulatory ordinances have a direct impact on the enforcement of state laws that have been enacted to preserve the health, safety and welfare of state and local citizens. This fact does not deprive a local entity of the power to enact them. (See Cohen v. Board of Supervisors, supra, at pp. 298–299 [licensing ordinance case].)"

Here, the case involves a prosecution of Los Angeles Municipal Code section 104.15, subdivision (b)(4), which, in part, states that it is unlawful to lease, rent to, or otherwise allow an "Unlawful Establishment" to occupy any portion of a land parcel. "Unlawful Establishment" is defined as "any Person engaged in Commercial Cannabis Activity if the Person does not have a City issued Temporary Approval or License." (LAMC § 104.01, subd. (a)(49).)

Petitioner is challenging the section by claiming that Health and Safety Code section 11366.5 preempts the Los Angeles Municipal Code. That section prohibits renting or leasing a building or room for the purpose of manufacturing, sale, etc. controlled substances (including cannabis).

Petitioner fails to allege facts demonstrating that enforcement of the City's ordinance is arbitrary or lacking a purpose so as to overcome the presumption of constitutionality. Criminal enforcement of Municipal Code section 105.14 by the City of Los Angeles is plainly in furtherance of public safety and protection against crime. (*People v. Gonzalez*, *supra*, 53 Cal.App.5th Supp. 1, 7-8).

Further, marijuana is a Schedule 1 controlled substance and federal law "continues to prohibit possession, cultivation, and distribution of marijuana notwithstanding modifications of drug laws in individual states." (*City of San Jose v. MediMarts, Inc.* (2016) 1 Cal.App.5th 842, 848; see *City of Riverside,* 56 Cal.4th at pp. 737-739; Controlled Substances Act (CSA), title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. § 801 et seq.) Under federal law, marijuana is a drug with 'no currently accepted medical use in treatment in the United States' . . . ." (*City of Riverside*, at p. 739.) There is no medical necessity exception under federal law. (*City of Riverside*, at pp. 738-739; *The Kind & Compassionate v. City of Long Beach* (2016) 2 Cal.App.5th 116, 120; *City of San Jose*, at p. 848,.) The federal law prohibitions are fully enforceable in California and are unaffected by state marijuana laws. (*City of Riverside*, at p. 740.) The fact that marijuana continues to be illegal under federal law defeats any contention that City's enforcement action is unconstitutional.

F. There Is No State Law Preemption

1. Petitioner Has Not Met Its Burden To Establish State Law Preemption

Petitioner, the party claiming state law preempts local law, has the burden of demonstrating preemption. (*Kruse, supra*, 177 Cal.App.4th at p. 1168.) Petitioner has not met this burden.

The general principles governing state statutory preemption of local land use regulation are well settled. (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1150); *Kruse, supra*, 177 Cal.App.4th at p. 1168.) Under article XI, section 7 of the California Constitution, " '[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.' " But " '[i]f otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.' " (*Sherwin–Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897(*Sherwin–Williams*), quoting *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885.) Three types of conflict give rise to state law preemption: a local law (1) duplicates state law, (2) contradicts state law, or (3) enters an area fully occupied by state law, either expressly or by legislative implication. (*Kruse, supra*, 177 Cal.App.4th at p. 1168; *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1242.)

Our Supreme Court has held that courts must presume, absent a clear indication to the contrary, that city and county regulation and its enforcement of its cannabis regulations are not preempted by state law because there are significant local interests that could vary by jurisdiction,

giving rise to a presumption against preemption. (*T-Mobile West LLC*, *supra*, 6 Cal.5th at p. 1123; (*City of Riverside*, 56 Cal.4th at p. 743.)

Here, there is no clear indication the Legislature intended for state law to preempt local restrictions and enforcement against cannabis facilities. The Los Angeles' municipal code provisions are not preempted by state law because there is no clear indication that the Legislature intended to remove local governments' constitutional police power authority to enact and enforce cannabis land use regulations.

Amici CalCities and CSAC's members are cities and counties with local municipal code provisions that provide that the violation of the municipal code provisions is a nuisance per se under state law and that enforcement is subject to both criminal and civil remedies. These cities and counties are directly responsible for local public safety for tens of millions of Californians. Petitioner's preemption arguments fundamentally erode the municipal police power authority to enforce cannabis regulations as recognized by the Legislature and the courts.

2. Petitioner Provides No Applicable Legal Authority for its Preemption Claims

Petitioner relies upon inapposite cases involving state law preemption generally and case law predating current statutory and case law upholding municipal police power authority to regulate cannabis facilities. A few cases are described below to illustrate Petitioner's misplaced reliance.

Petitioner relies heavily upon *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, but it has nothing to do with cannabis regulation, nothing

to do with California's statutes reaffirming municipal authority to regulate and ban cannabis facilities, pre-dates our Supreme Court's decision in *City of Riverside* holding that the state constitutional police power authority to regulate and enforce applies to municipal cannabis regulations, and has nothing to do with numerous other cases so holding after *O'Connell* was decided in 2007.

In any event, O'Connell is "readily distinguishable" because it does not apply to local governments' recognized police power authority to regulate marijuana distribution facilities. (*City of Riverside*, 56 Cal.4th at 756.) As the *City of Riverside* court stated:

> The *O'Connell* majority concluded, "[t]he comprehensive nature of the UCSA in defining drugs and specifying penalties (including forfeiture) is so thorough and detailed as to manifest the Legislature's intent to preclude local regulation. The UCSA accordingly occupies the field of penalizing crimes involving controlled substances, thus impliedly preempting the City forfeiture ordinance" calling for forfeiture of vehicles involved in the acquisition or attempted acquisition of drugs related under the UCSA. The majority explained that the "Legislature's comprehensive enactment of penalties for crimes involving controlled substances, but exclusion from that scheme any provision for vehicle forfeiture for simple possessory drug offenses, manifests a clear intent to reserve that severe penalty for serious drug crimes involving the manufacture, sale or possession for sale of specified amounts of certain controlled substances.

> **As indicated above there is no similar evidence in this case of the Legislature's intent to preclude local regulation of facilities that dispense medical marijuana**.
>
> . . .
>
> **[T]here is no preemption where state law expressly or implicitly allows local regulation.**

(City of Riverside, 56 Cal.4th at756-58 [citations omitted and emphasis added].)

Stated simply, municipal cannabis regulation and enforcement is consistent with Health and Safety Code section 11362.83 and Business and Professions Code section 26200 which permit local governments to regulate the location and establishment of cannabis facilities. Both statutory provisions recognize local governments' interests in exercising their police powers in regulating cannabis distribution facilities in furtherance of maintaining a safe and law-abiding community. The statutes allow local governments to regulate cannabis facilities in accordance with the unique characteristics, needs, and public preferences of each city and county. Taking this into account, the legislation allows a local government to regulate cannabis facilities within its own jurisdiction, with cannabis regulations inevitably differing among communities, but remaining consistent with the general provisions of state law. Thus, the City's ordinance, restricting the operation of cannabis facilities is consistent with and does not conflict with the provisions or purpose of state cannabis law or California's Controlled Substances Act.

Petitioner contends the holding in *Kirby v. County of Fresno* (2015) 242 Cal.App.4th 940 (*Kirby*) applies to the instant case and supports state law preemption of City criminal enforcement of local cannabis facility ordinance violations. Petitioner is incorrect.

In *Kirby*, the plaintiff filed a declaratory relief action asserting that a county ban on possession and cultivation of marijuana was preempted by state law that permitted her to cultivate medical marijuana for personal use. (*Kirby, supra*, 242 Cal.App.4th at p. 947.) "The *Kirby* court concluded that a very narrow portion of the county ordinance at issue was preempted; specifically, the county's absolute ban on individual cultivation, punishable as a misdemeanor, was preempted by that portion of the [Medical Marijuana Program Act (MMPA)] which protects qualified patients with valid medical marijuana identification cards from arrest for possession or cultivation of medical marijuana. [Citations.] The MMPA's protection of those individuals against arrest prohibits prosecutions under local ordinances for the same conduct. [Citation.]" (*Safe Life v. City of Los Angeles* (2016) 243 Cal.App.4th 1025, 1050.)

Kirby is also distinguishable from the instant case. The ordinance at issue in *Kirby* was an absolute ban on marijuana *cultivation* and conflicted with the Medical Marijuana Program Act (MMPA; Health & Saf. Code, § 11362.7 et seq.), which provided immunity from arrest and prosecution for *medical cultivation*. Unlike the ordinance in *Kirby*, Los Angeles Municipal Code section 104.15 does not criminalize personal use or cultivation; it regulates illegal cannabis distribution facilities.

"Moreover, the California Supreme Court has made clear that municipalities have the authority to prohibit the distribution of medical

marijuana within their jurisdictions "by declaring such conduct on local land to be a nuisance, and by providing means for its abatement." (*City of Riverside,* 56 Cal.4th at p. 762, fn. omitted.) The MMP specifically authorizes local regulation of the establishment, operation, and location of marijuana distributions facilities. (Health & Saf. Code, § 11362.83.) "The legislature amended [the MMPA], effective January 1, 2012, to read ...: [¶] '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)* . . . .' [Citations.]" (*Conejo Wellness Center, Inc. v. City of Agoura Hills* (2013) 214 Cal.App.4th 1534, 1545-1546 [emphasis in original].

Indeed, *Kirby* acknowledged "'local governments may regulate or ban the cultivation of medical marijuana because land use regulations are not preempted by the ... MMP[A].' (*Kirby, supra*, 242 Cal.App.4th at p. 970.)" (*People v. Onesra Ent, Inc.* (2016) 7 Cal.App.5th Supp. 7.)

None of the cases relied upon by Petitioner concern the voters passage of Proposition 64 and the enactment of Business and Professions Code section 26200. It is axiomatic that cases do not stand for propositions of law that were not specifically raised, and that is true with *O'Connell v. City Stockton*, *Kirby v. County of Fresno* and the other cases upon which Petitioner relies to make state law preemption arguments.

Here, Petitioner does not and cannot reasonably contend that cities and counties do not have constitutional police power authority to regulate and even ban cannabis facilities and to enforce the regulations. Petitioner

instead erroneously contends that state law preempts the constitutional police power authority to criminally enforce the regulations. But the power to regulate necessary includes the power to enforce and there is nothing in the cannabis statutes and cases post-*O'Connell v. City of Stockton* that removes the enforcement power let alone clearly indicates the Legislature's intent to do so.

II. CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the petition be denied.

Dated: August 12, 2021

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The text of this brief consists of 6,889 words according to the word count feature of the computer program used to prepare this brief.

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PROOF OF SERVICE

I, Kerry V. Keefe, declare:

I am a citizen of the United States and employed in Orange County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 18101 Von Karman Avenue, Suite 1000, Irvine, California 92612. On August 12, 2021, I served a copy of the within document(s):

APPLICATION FOR PERMISSION TO FILE AMICI CURIAE BRIEF AND AMICI BRIEF IN SUPPORT OF RESPONDENT CITY OF LOS ANGELES

☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, the United States mail at Irvine, California addressed as set forth below.*

☐ by placing the document(s) listed above in a sealed _____ envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a _____ agent for delivery.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☐ by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

☒ Via TrueFiling to the person(s) at the e-mail address(es) set forth below.

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

Executed on August 12, 2021, at Irvine, California.

Kerry V. Keefe

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