

LEAGUE OF CALIFORNIA CITIES  
CITY ATTORNEYS' DEPARTMENT, MAY 2012

# MEDICAL MARIJUANA REGULATION IN CALIFORNIA

**Heather Aubry**  
City of Los Angeles

**Lauren Langer**  
Jenkins & Hogin

**Jeff Dunn**  
Best, Best & Krieger



# MEDICAL MARIJUANA REGULATION IN CALIFORNIA

- ⊙ Overview of CUA and MMP
- ⊙ Federal Law and Preemption
- ⊙ State Preemption and Local Regulation Issues
- ⊙ Federal Enforcement Activities
- ⊙ Recent Developments

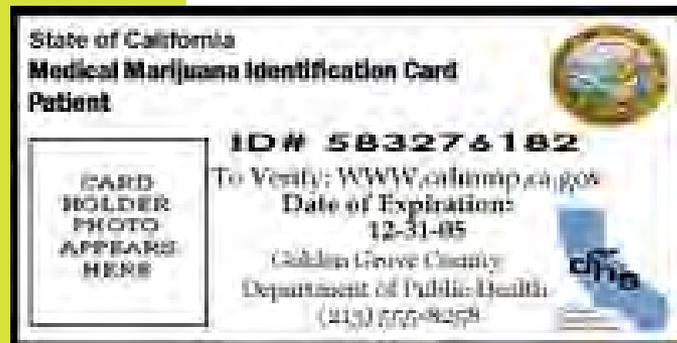
# COMPASSIONATE USE ACT



- ⊙ Proposition 215: Passed by voters in 1996
- ⊙ To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes
- ⊙ Must have physician's recommendation
- ⊙ The CUA exempts patients and their primary caregivers from criminal liability under state law for the possession and cultivation of marijuana for personal medical use.
- ⊙ Provides limited criminal defense

# MEDICAL MARIJUANA PROGRAM

- ⊙ Legislative enactment (S.B. 420) intended to:
- ⊙ Clarify the scope of the application of the CUA and facilitate prompt identification of qualified patients and their primary caregivers in order to avoid unnecessary arrest and prosecution of these individuals and provide needed guidance to law enforcement officers;



# MEDICAL MARIJUANA PROGRAM

- ① Promote uniform and consistent application of the CUA among the counties within the state;
- ① Enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects; and
- ① Address additional issues that were not included in the CUA in order to promote the fair and orderly implementation of the Act.
- ① Health & Safety Code §11362.7 et seq.





# MEDICAL MARIJUANA PROGRAM

- ⊙ Additional criminal immunities for qualified patients, primary caregivers and others who engage in specified conduct
- ⊙ Arrest immunity for state medical marijuana ID card holders
- ⊙ “As part of its effort to clarify and smooth implementation of the Act, the Program immunizes from prosecution a range of conduct ancillary to the provision of medical marijuana to qualified patients. (§11362.765.)” *People v. Mentch* (2008)
- ⊙ Example: Designated primary caregiver who transports, processes, administers, delivers, or gives away marijuana to patient shall not be subject, on that sole basis, to criminal liability.
- ⊙ Contemplates local regulation (§11362.768; §11362.83)

# FEDERAL CONTROLLED SUBSTANCES ACT

- ⊙ Prohibits all activities related to marijuana, including possession, cultivation, and distribution
- ⊙ Schedule I Controlled Substance
- ⊙ No exception for medical use
- ⊙ 21 U.S.C. §801 et seq.

# U.S. SUPREME COURT AND MEDICAL MARIJUANA

- ⊙ No medical necessity defense to federal prosecution under the CSA. *United States v. Oakland Cannabis Buyers' Cooperative* (2001)
- ⊙ Within Congress' power under Commerce Clause to regulate marijuana.
- ⊙ Did not declare CUA invalid but stated: "Limiting the activity to marijuana possession and cultivation 'in accordance with state law' cannot serve to place respondents' activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail."
- ⊙ *Gonzales v. Raich* (2005)



# FEDERAL PREEMPTION

- ⊙ State and local laws regarding medical marijuana may raise federal preemption issues.
- ⊙ Several appellate decisions have addressed federal preemption.
- ⊙ Three cases are of particular significance.

# FEDERAL PREEMPTION

- ⊙ *City of Garden Grove v. Superior Court (Kha) (2007)*
- ⊙ Garden Grove police seized small amount of marijuana from Kha during traffic stop. Criminal case was dismissed because Kha produced doctor's recommendation to use marijuana.
- ⊙ Trial court ordered return of the marijuana and the City challenged the order based on the CSA.
- ⊙ The court held that federal drug laws do not preempt state law and, because Kha's possession was lawful under the CUA, the marijuana must be returned.
- ⊙ Relied on Section 903 of the CSA in finding no federal preemption.

# FEDERAL PREEMPTION

- ⊙ *County of San Diego v. San Diego NORML (2008)*
- ⊙ Counties of San Diego and San Bernardino challenged requirement under MMP that counties administer state medical marijuana identification card program.
- ⊙ The Court of Appeal rejected the Counties' federal preemption argument, finding no positive conflict between the ID program and the CSA.
- ⊙ The court also rejected obstacle preemption, even though it concluded the CSA signified Congressional intent to only preempt laws that positively conflict.
- ⊙ No need to address express or field preemption.

- 
- ⊙ The card merely identifies those persons California has elected to exempt from California's sanctions and does not authorize violation of federal law.
  - ⊙ The issuance of state ID cards to medical marijuana users and their caregivers does not pose a significant impediment to federal objectives embodied in the CSA. The court stated the purpose of the CSA is to “combat recreational drug use, not to regulate a state’s medical practices.”
  - ⊙ *Pack* court disagreed.



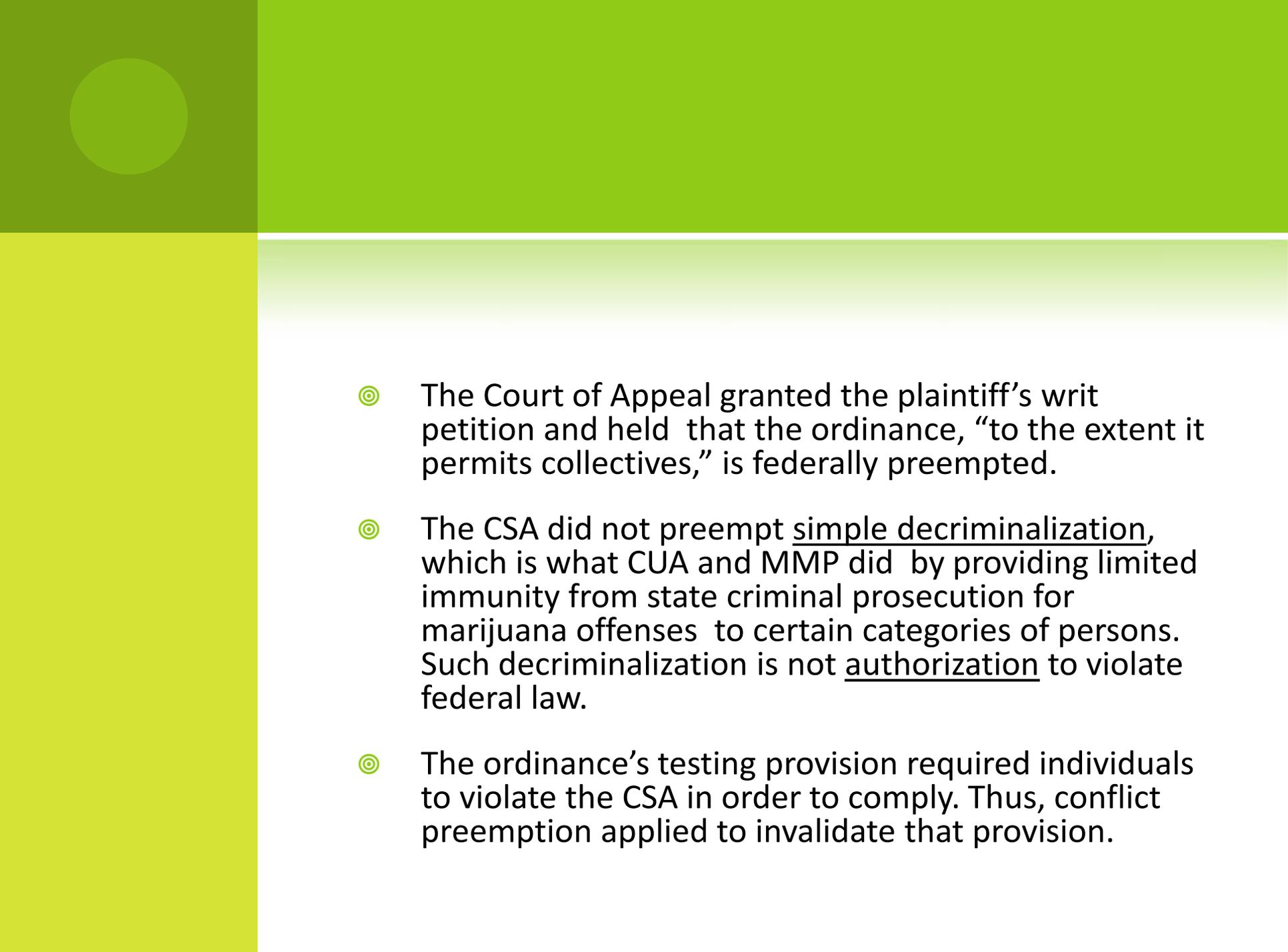
# FEDERAL PREEMPTION

- ⊙ *Qualified Patients Assn. v. City of Anaheim* (2010)
- ⊙ The City of Anaheim enacted ordinance banning medical marijuana dispensaries, which was challenged by plaintiff association based on state law preemption and the Unruh Civil Rights Act.
- ⊙ The Court of Appeal did not rule on the state law preemption claim, finding that it was not ripe, but reversed the trial court judgment sustaining the City's demurrer based on federal preemption.
- ⊙ The CSA and federal supremacy principles do not preempt either the CUA or the MMP under the limited scope of federal preemption described in 21 U.S.C. § 903.

- 
- ③ Decriminalization of certain conduct related to medical marijuana in state law does not override or conflict with federal law.
  - ③ The City cannot justify its ordinance based solely on federal law or invoke federal preemption of state law based on claim that state law is being abused.
  - ③ The CUA and MMP do not mandate what federal law prohibits or pose an obstacle to enforcement of federal law.
  - ③ Strong presumption against federal preemption in relation to state regulation of medical practices and sanctions for drug possession.

# FEDERAL PREEMPTION

- ⊙ *Pack v. Superior Court (City of Long Beach)* (2011)
- ⊙ City of Long Beach enacted ordinance regulating medical marijuana “collectives,” defined as four or more patients and/or primary caregivers who associate to collectively or cooperatively cultivate medical marijuana.”
- ⊙ Ordinance required collectives to submit application and pay fee of \$14,742. Lottery would determine which qualified applicants would obtain a permit and only permitted collectives could operate in the City.
- ⊙ Regulations included numerous operating conditions such as security and marijuana testing requirements.

- 
- ⊙ The Court of Appeal granted the plaintiff's writ petition and held that the ordinance, "to the extent it permits collectives," is federally preempted.
  - ⊙ The CSA did not preempt simple decriminalization, which is what CUA and MMP did by providing limited immunity from state criminal prosecution for marijuana offenses to certain categories of persons. Such decriminalization is not authorization to violate federal law.
  - ⊙ The ordinance's testing provision required individuals to violate the CSA in order to comply. Thus, conflict preemption applied to invalidate that provision.

- 
- ③ The court held that Long Beach’s ordinance “goes beyond decriminalization into authorization.” Therefore, obstacle preemption applies.
  - ③ By determining which collectives are permissible and which collectives are not, and collecting fees as a condition of continued operation by permitted collectives, the court concluded that the City crossed the line.
  - ③ State and local laws which license the large-scale cultivation and manufacture of marijuana stand as an obstacle to federal enforcement efforts.

- 
- ⊙ Footnote 27: There may also be an issue of whether the ordinance *requires* certain City officials to violate federal law by aiding and abetting or facilitating a violation of the federal CSA.
  - ⊙ California Supreme Court granted review on January 18, 2012
  - ⊙ Provisions of the ordinance which simply identify prohibited conduct or impose restrictions may not be federally preempted to the extent they are not tied to the permit process. The court left it to the trial court on remand to interpret whether such restrictive provisions could stand alone.
  - ⊙ The CA Supreme Court's decision in *Pack* is expected determine the extent to which federal law constrains local authorities' ability to regulate medical marijuana.

# LOCAL REGULATION: COLLECTIVE AND COLLABORATIVE CULTIVATION

- ◎ Section 11362.775: Provides limited immunity related to collective cultivation of marijuana to caregivers and patients.
- ◎ ... shall not solely on the basis of that fact be subject to state criminal sanctions for:
  - Marijuana possession
  - Cultivation
  - Possession for sale or distribution
  - Transportation
  - Maintaining a place for sale, use, or distribution of marijuana
  - Using property to grow, store, or distribute marijuana
  - Nuisance activities related to controlled substances



# LOCAL REGULATION: COLLECTIVE AND COLLABORATIVE CULTIVATION

- ⊙ Advocates argue that MMP authorizes distribution from storefront dispensaries
  - ⊙ *People v. Urziceanu* (2005)132 Cal.App.4th 747
    - Legislature created a dramatic change in the prohibitions on the use, distribution, and cultivation of marijuana for persons who are qualified patients or primary caregivers.
    - Acknowledging patients and caregivers may “maintain a place for sales, use or distribution” shows that Legislature contemplated formation and operation of medical marijuana cooperatives that would receive reimbursement for marijuana and the services.



# A.G. GUIDELINES (2008)

- ⊙ Limit lawful distribution activities to true agricultural co-ops and collectives that provide crops to their members
- ⊙ Prohibit collectives and cooperatives from profiting from the sale of marijuana– must be non-profit
- ⊙ Allow reimbursement for certain services (including cultivation), provided it is limited to the amount to cover overhead costs and operating expenses;
- ⊙ Allow members to reimburse the collective for marijuana that has been allocated to them, or it may be provided free to members, provided in exchange for services, allocated based on fees for reimbursement only, or any combination
- ⊙ Declare distribution of medical marijuana is subject to sales tax and requires a seller's permit from the State Board of Equalization

# A.G. GUIDELINES (2008)

- ⊙ “Storefront dispensaries that deviate from these Guidelines are likely outside the scope of state law.”
- ⊙ Many cities used these guidelines to draft land use ordinances
- ⊙ Current Attorney General dissatisfied with the Guidelines issued by her predecessor
  - ⊙ Better characterize: collective operations, edible products, profit making businesses, seizure of marijuana, cultivation, and delivery/transportation

# STATE PREEMPTION: CAN CITIES REGULATE MEDICAL MARIJUANA ACTIVITIES?

- ⊙ Article XI, Section 7: traditional zoning under police power – choose what uses are appropriate and where they belong
- ⊙ *City of Corona v. Naulls* (2008) 166 Cal.App.4th 418
  - ⊙ Mischaracterized business as “retail”
  - ⊙ MMD not listed as permitted use → prohibited
  - ⊙ Did not get similar use determination
  - ⊙ Nuisance
  - ⊙ Traditional zoning prevailed- MMD cannot bypass zoning process

# STATE PREEMPTION: CAN CITIES REGULATE MEDICAL MARIJUANA ACTIVITIES?

- ⊙ *City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153.
  - ⊙ Temporary Moratorium
  - ⊙ Kruse's operation nuisance per se
  - ⊙ No express or implied preemption by CUA or MMP

“Nothing in the text or history of the CUA suggests it was intended to address local land use determinations or business licensing issues.”

“Neither the CUA nor the MMP compels the establishment of local regulations to accommodate medical marijuana dispensaries. The City's enforcement of its licensing and zoning laws. . . . do not conflict with the CUA or the MMP”

# STATE PREEMPTION: CAN CITIES REGULATE MEDICAL MARIJUANA ACTIVITIES?

- ⊙ *County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861.
- ⊙ Operating without a required license
- ⊙ Zoning ordinance not preempted by CUA or MMP
- ⊙ Recently enacted Section 11362.768
  - ⊙ (b) Prohibits medical marijuana co-op or collective within a 600-foot radius of a school
  - ⊙ (f) 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.
  - ⊙ (g) Nothing in this section shall preempt local ordinances, adopted prior to January 1, 2011, that regulate the location or establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider.

# STATE PREEMPTION: CAN CITIES REGULATE MEDICAL MARIJUANA ACTIVITIES?

## *Hill Cont'd:*

- ⊙ Section 11362.775 does not affect the County's "constitutional authority to regulate the particular manner and location in which a business may operate (Cal. Const., art. XI, § 7) . . .
- ⊙ While decriminalized, MMP does not confer qualified patients and their caregivers unfettered right to cultivate or dispense marijuana anywhere they choose.
- ⊙ Section 11362.83: Legislature showing "it expected and intended that local governments [would] adopt additional ordinances.

# STATE PREEMPTION: CAN CITIES REGULATE MEDICAL MARIJUANA ACTIVITIES?

- ⊙ Assembly Bill 1300 (effective January 1, 2012),
  - ⊙ Amended Health and Safety Code section 11362.83
  - ⊙ The amendment further clarifies that the MMP in no way limits a local government's power to adopt and enforce its own laws:

Nothing in [the MMP] 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); and (c) Enacting other laws consistent with this article

# STATE PREEMPTION: CAN CITIES REGULATE MEDICAL MARIJUANA ACTIVITIES?

- ⊙ On September 20, 2011, the Governor confirmed local control over marijuana dispensaries under A.B. 1300 when he vetoed S.B. 847

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

# STATE PREEMPTION: CAN CITIES REGULATE MEDICAL MARIJUANA ACTIVITIES?

## ⊙ Four More Unpublished Decisions: No State Law Preemption

### ⊙ ***City of Gilroy v. Kuburovich (October 25, 2011)***

- Absent a clear showing that Legislature intended to preempt the field, we will not find general laws preempt local ordinances, particularly ones dealing with land use, a matter customarily the function of local government.

### ⊙ ***City of Riverside v. Inland Empire Patient's Health and Wellness Center, Inc. (November 9, 2011) (de-published pending Cal. Supreme Court review)***

- A municipality can limit or prohibit MMD's through zoning regulations and prosecute such violations by bringing a nuisance action. (4th Appellate District, Division 2)

### ⊙ ***People v. G3 Holistic (November 9, 2011) (Cal. Supreme Court review pending)***

- City of Upland's ban is not preempted by state law. Rejected appellant's assertion that Section 11362.768 only restricts the location of dispensaries, but does not authorize complete bans. (same court as *Inland Empire*)

### ⊙ ***People v. Wildomar Patients (March 22, 2012)***

- MMP explicitly authorized the implementation of local ordinances regarding the regulation or establishment of MMDs within their jurisdictions. (COA requested Cal. Supreme Court not publish).



# STATE PREEMPTION: CAN CITIES REGULATE MEDICAL MARIJUANA ACTIVITIES?

- ⊙ City of Lake Forest v. Evergreen Holistic Collective (“Evergreen”) (2012) 203 Cal.App.4th 141 (petition for California Supreme Court review filed on April 9, 2012).
- ⊙ Split of authority between *Kruse* and *Evergreen*

# STATE PREEMPTION: CAN CITIES REGULATE MEDICAL MARIJUANA ACTIVITIES?

- ⊙ As cities await the Supreme Court's ruling on pending request for review and/or depublication, it may be prudent to adopt a "wait and see" approach and refrain from taking legislative action premised on an assumption that *Evergreen* is and will remain binding authority.



# RECENT FEDERAL ENFORCEMENT ACTIVITIES

- ⊙ Cities should remain cautious the United States Department of Justice will enforce the federal CSA regardless of the outcome in the pending cases before the California Supreme Court.
- ⊙ *Pack v. Superior Court*, fn. 27.

# RECENT DEVELOPMENTS

- ⊙ Publication of *People v. Joseph* (“Section 11362.775 Section 11362.775 protects group activity to cultivate marijuana for medical purposes. It does not cover dispensing or selling marijuana.”)
- ⊙ Recent California Supreme Court request for briefing in original proceeding
- ⊙ ADA Case – waiting for the Ninth Circuit ruling.

# WHAT THE VOTERS INTENDED?



"There are now more medical marijuana clinics in the city of Los Angeles than there are Starbucks."

*"Up in Smoke," KCET 4/9/09*

"Marijuana Vending Machine Debuts in Southern California"

*LA Weekly, 4/23/12*

