IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT – DIVISION TWO

CITY OF TEMECULA,

Plaintiff and Respondent,

v.

COOPERATIVE PATIENTS SERVICES, INC.,

Defendant and Appellant.

Case No. E053310
Riverside Superior Court
Case No. RIC 1103777
Hon. Craig Riemer

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES TO FILE *AMICUS* BRIEF IN SUPPORT OF RESPONDENT; PROPOSED BRIEF OF *AMICI CURIAE*

JEFFREY V. DUNN, Bar No. 131926
LEE ANN MEYER, Bar No. 108472
BEST BEST & KRIEGER LLP
5 Park Plaza, Suite 1500
Irvine, California 92614
Telephone: (949) 263-2600
Facsimile: (949) 260-0972
Attorneys for *Amici Curiae* League of California Cities & California State Association of Counties

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO	Court of Appeal Case Number: E053310
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* Jeffrey V. Dunn, SBN 131926; Lee Ann Meyer, SBN 108472 Best Best & Krieger, LLP 5 Park Plaza, Suite 1500 Irvine, California 92614 TELEPHONE NO.: (949) 263-2600 FAX NO. *(Optional):* (949) 260-0972 E-MAIL ADDRESS *(Optional):* ATTORNEY FOR *(Name):* League of Calif. Cities & Calif. State Assoc. of Counties	Superior Court Case Number: RIC1103777 *FOR COURT USE ONLY*
APPELLANT/PETITIONER: CITY OF TEMECULA RESPONDENT/REAL PARTY IN INTEREST: COOPERATIVE PATIENTS SERVICES, INC.	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Amici Curiae League of California Cities & California State Association of Counties

2. a. ☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

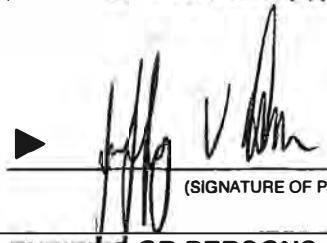
Full name of interested entity or person	Nature of interest *(Explain):*
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: February 23, 2012

Jeffrey V. Dunn
(TYPE OR PRINT NAME)

▶ 
(SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2009]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
www.courtinfo.ca.gov

American LegalNet, Inc.
www.FormsWorkflow.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

STATUTES

OTHER AUTHORITIES

09977.00001\7314333.1

Application Of The League Of California Cities And California State Association Of Counties To File *Amici Curiae* Brief In Support of Respondent

To the Honorable Presiding Justice of this Court:

The League of California Cities ("League") and the California State Association of Counties ("CSAC") request leave to file an *amici curiae* brief in this case in support of the position of Respondent City of Temecula.

An increasing number of the League's and CSAC's members have grappled with fundamental land use problems similar to those Temecula confronted in enacting the ban at issue in this case. By one advocacy group's recent count, 81 cities and 10 counties have adopted moratoria prohibiting medical marijuana dispensaries, and 168 cities and 17 counties have adopted permanent prohibitions of one sort or another. (See http:www.safeaccessnow.org/article.php?id=3165.) The issues presented in this case are of deep concern to many cities and counties.

The trial court's issuance of a preliminary injunction below is consistent with the Compassionate Use Act ("CUA") and the Medical Marijuana Program Act ("MMPA"). Moreover, this ruling comports with cases interpreting these statutes, settled principles of statutory construction, and recently enacted amendments to the MMPA, all of which together establish clearly that neither the voters nor the Legislature in any manner intended or undertook to prohibit the local land use regulations enacted by the City of Temecula and over 200 other cities and counties statewide.

In so doing, the preliminary injunction further complies with settled constitutional separation of powers principles. Courts are to defer to the legislative judgments made by

locally elected legislative bodies – here, a city council – about the wisdom of and need for public safety regulations.

The League and CSAC have appeared as *amici curiae* before this and other courts on matters involving similar issues, including *Pack v. Superior Court of Los Angeles County (City of Long Beach)* 199 Cal.App.4th 1070, *review granted*, January 18, 2012, Case No. S197169 ("*Pack*").

Counsel for the League and CSAC are familiar with the issues in this case and the scope of their presentation and believe further argument is needed on the following point: California cities and counties have broad, constitutional authority to enact local land use and zoning regulations. Neither the CUA nor the MMPA preempts such local regulation.

Dated: February 23, 2012

BEST BEST & KRIEGER LLP

By: _____
JEFFREY V. DUNN
LEE ANN MEYER
Attorneys for *Amici Curiae*
League of California Cities &
California State Association
of Counties

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT – DIVISION TWO

CITY OF TEMECULA,

Plaintiff and Respondent,

v.

COOPERATIVE PATIENTS SERVICES, INC.,

Defendant and Appellant.

Case No. E053310
Riverside Superior Court
Case No. RIC 1103777
Hon. Craig Riemer

[PROPOSED] BRIEF OF *AMICI CURIAE* LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES

JEFFREY V. DUNN, Bar No. 131926
LEE ANN MEYER, Bar No. 108472
BEST BEST & KRIEGER LLP
5 Park Plaza, Suite 1500
Irvine, California 92614
Telephone: (949) 263-2600
Facsimile: (949) 260-0972
Attorneys for *Amici Curiae* League of California Cities & California State Association of Counties

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Cities and counties statewide have confronted the widespread proliferation of marijuana distribution facilities. Wide ranging and increasing reports of crimes and other threats to public safety from marijuana dispensaries, collectives or cooperatives ("marijuana distribution facilities"), increase the risk to public safety and welfare through murders, assaults, burglaries, robberies, illegal narcotics sales, driving under the influence, teen substance abuse, and other crimes and public nuisances. In particular, nearby schools, businesses, churches, and residential areas suffer due to marijuana distribution facilities.[1]

Cities and counties have a duty to protect the public safety. They fulfill their duty by exercising their constitutional authority to regulate various activities including, for example, their establishment and location. Under our constitutional form of government, cities and counties act through their elected city councils and boards of supervisors, which are charged with making the land use decisions for their respective cities and counties.

In the particular case of marijuana, we start first with the fact that

---

[1] The California Police Chiefs Association has compiled police reports, news stories and statistical research regarding such secondary impacts in a 2009 white paper report located at: http://www.procon.org/sourcefiles/CAPCAWhitePaperonMarijuanaDispensaries.pdf.

there is no constitutional right to use or distribute the substance. For decades, marijuana advocates have litigated every conceivable basis for claiming a right to use or distribute marijuana, especially constitutional rights, statutory rights, and medical necessity. Yet, courts have consistently recognized no constitutional right, no statutory right, no medical necessity defense, and no fundamental policy to protect marijuana use or distribution.

More important for this discussion, the Compassionate Use Act ("CUA") and the Medical Marijuana Program Act ("MMPA") do not preempt cities' constitutional authority to regulate and restrict marijuana distribution facilities. The issue has now been resolved, first by the Court of Appeal in *City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153 ("Kruse"), again in *County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861 ("Hill"), and recently in the Legislature's enactment of Assembly Bill 1300, amending Health and Safety Code section 11362.83.

Moreover, the *Hill* court recognized that if there ever had been doubt on the issue, a recent amendment to the MMPA eliminated it: "If there was ever any doubt about the Legislature's intention to allow local governments to regulate marijuana dispensaries, and we do not believe there was, the newly enacted [Health and Safety Code][2] section 11362.768, has made

---

[2] Unless otherwise indicated, all code references are to the Health and Safety Code.

clear that local governments may regulate dispensaries." (192 Cal.App.4th at p. 868 [emphasis added].) Subsequent to the *Hill* decision, the Legislature, in its recent enactment of A.B. 1300, which amends Section 11362.83, acted again to eliminate any lingering doubt about cities' and counties' authority not only to regulate marijuana distribution facilities' existence and operations, but to impose both civil and criminal penalties for violating such regulations. The trial court thus properly exercised its discretion in issuing the preliminary injunction.

It is also important to recall that marijuana is still illegal under federal law. Moreover, the CUA and MMPA provide only an affirmative defense to criminal prosecution under California law for certain medicinal uses, not a right to use or distribute marijuana. The constitutional right to regulate marijuana distribution facility locations and secure compliance with the City of Temecula ("City") ordinance at issue should be recognized and protected by the courts.

As shown below, Appellant failed to meet the burden of establishing preemption. First, cities and counties have broad constitutional powers to protect public safety and regulate land uses such as those here. Second, California law recognizes that cities and counties are not preempted from restricting marijuana distribution facilities. Third, California's marijuana laws, the CUA and the MMPA, not only anticipate such local regulation,

they expressly allow it. *Amici curiae* League and CSAC therefore respectfully request the Court affirm the trial court's ruling.[3]

II. INTERESTS OF AMICI CURIAE

The League is an association of 469 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. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those that are of statewide – or nationwide – significance. The Committee has identified this case as being of such significance.

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 Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsel throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has also determined that this case is a matter affecting all counties.

---

[3] The League and CSAC do not address the parties' other arguments, but their election to analyze only the issue of preemption should not be interpreted as agreement with Appellant's other contentions.

III. LEGAL ANALYSIS

Preliminarily, it is worth noting that no federal court has recognized any constitutional or other protected right to obtain, use, or dispense marijuana for medicinal purposes.[4] As shown below, California constitutional and statutory law gives power to local governments to regulate marijuana distribution facilities and does not provide a right to distribute marijuana.

A. The Federal And State Constitutions Give Power To Local Governments To Regulate Land Uses

1. Local Governments Have Constitutional Authority To Regulate and Restrict Marijuana Distribution Facilities

---

[4] (*County of Santa Cruz v. Ashcroft* (N.D. Cal. 2003) 279 F. Supp. 2d 1192 ["[E]very ... court in this circuit to consider a similar argument concerning marijuana has held that there is no fundamental right to cultivate or possess marijuana for medicinal use"); *Raich v. Ashcroft* (N.D. Cal. 2003) 248 F. Supp.2d 918, 928 ("Plaintiffs ... do not have a fundamental, constitutional right to obtain and use [marijuana] for treatment."); *United States v. Osburn* (C.D. Cal. 2003) 2003 U.S. Dist. Lexis 8607, at *2; *Lepp v. Gonzalez* (N.D. Cal., Aug. 2, 2005) 2005 U.S. Dist. Lexis 41525, at *26; *Phillips v. City of Oakland* (N.D. Cal. 2007) No. C 07-3885 CW, 2007 U.S. Dist. Lexis 94651, at *5-6 [rejecting equal protection and due process claims, holding "[e]ven though [the CUA] permits the personal use of marijuana for medical reasons, the commercial sale of medical marijuana is still illegal under California's criminal law."]; *United States v. Cannabis Cultivator's Club* (N.D. Cal. Feb 25, 1999) 1999 U.S. Dist. Lexis 2259, defendants, members of a cannabis cooperative, sought a judicial declaration that they had a fundamental right to use medical marijuana to alleviate their suffering. The district court rejected defendants' argument, and stated defendants did not have a constitutional right to obtain marijuana from a medical cannabis cooperative free of government police power. (*Id.* at pp. *2-*3, citing *Carnohan v. United States* (9th Cir. 1980) 616 F.2d 1120, 1121].)

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." This constitutional power, enjoyed by every city and county, is commonly known as the "police power." As the Court noted in *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885, "(u)nder the police power granted by the Constitution, counties and cities have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law. (Cal. Const., art. XI, § 7.) Apart from this limitation, the 'police power. . . is as broad as the police power exercisable by the Legislature itself.' (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 140)." This police power, of course, extends to local land use regulations. (See *Berman v. Parker* (1954) 348 U.S. 26, 32-33; *Big Creek Lumber v. County of Santa Cruz* (2006) 38 Cal. 4th 1139, 1151.)

The California Supreme Court has repeatedly held that local legislative enactments must be upheld unless the challenger shows that the legislation is arbitrary. (*San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th at p. 674 fn. 16 (citing *Santa Monica Beach v. Superior Court* (1999) 19 Cal. 4th 952, 966).) The burden of proving that the legislation is arbitrary is on the party challenging it. (*San Remo Hotel*,

supra, 27 Cal.4th at p. 666.) This deferential arbitrary and capricious standard is the appropriate standard of review which the trial court applied in analyzing this dispute, and the lens through which this Court must review this appeal.

Some 60 years ago, the California Supreme Court recognized that constitutional challenges to the legislative judgments of local governments, and courts' reviews of such challenges, implicate important constitutional separation of powers principles. The Supreme Court has consistently accorded the broadest possible deference to the judgments of municipalities as a coordinate branch of government. "(W)e must keep in mind the fact that the courts are examining the act of a coordinate branch of the government -- the legislative -- in a field in which it has paramount authority, and not reviewing the decision of a lower tribunal or of a fact-finding body. As applied to the case at hand, the function of this court is to determine whether the record shows a reasonable basis for the action of the zoning authorities, and, if the reasonableness of the ordinance is fairly debatable, the legislative determination will not be disturbed." (*Lockard v. City of Los Angeles* (1949) 33 Cal.2d 453, 461-462.)

A claimant who advances a facial challenge to a regulation faces an "uphill battle." (*Action Apartment Assn. v. City of Santa Monica* (2008) 166 Cal.App.4th 456, 468; *Shea Homes Limited Partnership v. County of*

Alameda (2003) 110 Cal.App.4th 1246, 1266; *Home Builders Assn. v. City of Napa* (2001) 90 Cal.App.4th 188, 194.) A facial claim is only tenable if the terms of the regulation will not permit those who administer it to avoid an unconstitutional application to the complaining parties. (*Napa*, *supra*, 90 Cal.App.4th at 194; *San Mateo County Coastal Landowners' Assn. v. County of San Mateo* (1995) 38 Cal.App.4th .523, 547.) Courts thus presume legislative acts to be valid; every intendment is in favor of their validity. (*Lockard*, *supra*, at p. 460; *Big Creek Lumber Co.*, *supra*, 38 Cal.4th at p. 1152.) This presumption will not be overturned unless the plaintiff produces evidence compelling the conclusion that the ordinance is, as a matter of law, "arbitrary" (*San Remo Hotel v. City and County of San Francisco*, *supra*, 27 Cal.4th at p. 671), or unreasonable and invalid (*Lockard*, *supra*, 33 Cal.2d at p. 461; *Orinda Homeowners Committee v. Board of Supervisors* (1970) 11 Cal.App.3d 768, 775).

Courts further presume that the legislative body ascertained the existence of necessary facts to support its legislative determination, and that the "necessary facts" are those required by the applicable standards. (*Orinda*, *supra*, 11 Cal.App.3d at p. 775; *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 510-511.) Courts are bound to uphold the challenged legislation so long as the Legislature could rationally have determined a set of facts that support it. (*Vo v. City of Garden Grove* (2004) 115

Cal.App.4th 425, 442-443; *Alfaro, supra*, 98 Cal.App.4th at p. 510-11; *Hall v. Butte Home Health, Inc.* (1997) 60 Cal.App.4th 308, 322.)

Land use regulation in California – such as the enactment and enforcement of land use ordinances – is the function of local governments under the police power granted by Article XI, section 7 of the California Constitution. (*Big Creek Lumber Co., supra*, 38 Cal.4th at p. 1151.) "[A] city's power to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state." (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 782.) The Legislature expressed its intent, when enacting state zoning laws, "'to provide only a minimum of limitation in order that counties and cities may exercise the *maximum* degree of control over local zoning matters.'" (*Id.* [quoting Government Code § 65800] [emphasis added].)

The state's police power is the source of its right to adopt regulations designed to "promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety." (*Chicago, B. & Q. R. Co. v. Illinois* (1906) 200 U.S. 561, 592.) The legislative power of a city under Article XI, section 7 of the California Constitution, is as broad as that of the state legislature, subject only to limitations of general law. (*Candid Enterprises, supra*, 39 Cal.3d at p. 885.) Thus, given that Article XI, Section 7 of the

California Constitution empowers local governments to make all ordinances and regulations not in conflict with general laws, "it is enough that the [local] authority has the power to act." (*Golden Gate Water Ski Club v. County of Contra Costa* (2008) 165 Cal.App.4th 249, 255-56.)

2. Courts Should Not Substitute Their Judgment For That Of The Municipal Legislative Zoning Determination If There Is Any Reasonable Justification For The Determination

The United States Supreme Court has ruled that deference must be given to the legislative intent of the drafters of local ordinances. The Court stated: "It is not our function to appraise the wisdom of its decision. . . . In either event the City's interest in attempting to preserve the quality of urban life is one that must be accorded high respect." (*Young v. Am. Mini Theatres, Inc.* (1976) 427 U.S. 50, 71.) Moreover, the California Court of Appeal, in *Carty v. City of Ojai* (1978) 77 Cal.App.3d 329, 333 fn. 1, described the judiciary's limited role in considering the validity of local regulations, specifically involving zoning:

> "The wisdom of the [zoning regulation] is a matter for legislative determination, and even though a court may not agree with that determination, it will not substitute its judgment for that of the zoning authorities if there is any reasonable justification for their action;" and "The function of this court is to determine whether the record shows a reasonable basis for the action of the zoning authorities, and, if the reasonableness of the ordinance is fairly debatable, the legislative determination will not be disturbed."

Here, the Temecula Municipal Code should be presumed to embody

what the drafters intended. (See *Los Angeles Taxpayers Alliance v. Fair Political Practices Com.* (1993) 14 Cal.App.4th 1214, 1219 ["[S]ince we are dealing with statutory interpretation, we begin with the cardinal rule applicable to that task: the court must ascertain the legislative intent so as to effectuate the purpose of the law."].) Appellant bears the burden to show why this presumption should be disturbed. (See *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 788 ["A presumption exists that in enacting a statute, the Legislature did not intend it to violate the Constitution, but instead intended to enact a valid statute within the scope of its constitutional powers."].)

In this case, the City exercised its broad police power to enact a land use ordinance to protect the health, morals and safety of the citizens within its boundaries.

B. There Is No Constitutional Right To Use Or Distribute Marijuana.

In *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 774, the Court of Appeal held, "[t]he Compassionate Use Act created a *limited defense to crimes*, not a constitutional right to obtain marijuana." (Emphasis added.) Additionally, the criminal defenses in the CUA are "limited to the narrow circumstances approved by the voters." (*Ibid.*) Further, the CUA "does not allow the importation or cultivation of marijuana." (*Id.* at p. 774.) When

marijuana distributor Urziceanu attempted to assert that "California has granted to its citizenry the right to use marijuana as medicine, upon the recommendation of a physician," and "qualifying patients have a constitutional right to avail themselves of that treatment[,]" the Court of Appeal responded, "*He is wrong*." (Id. at p. 773 [emphasis added].) Given the CUA's limited reach, the *Urziceanu* decision held that "courts have consistently resisted attempts by advocates of medical marijuana to broaden the scope" of its specific, enumerated protections. (*Id.* at p. 773; see also *People v. Bianco* (2001) 93 Cal.App.4th 748, 754 ["There is no fundamental state or federal constitutional right to use drugs of unproven efficacy...."]; *National Organization for Reform of Marijuana Laws v. Gain* (1979) 100 Cal.App.3d 586 [rejecting privacy, equal protection, due process and other constitutional claims].)

1. There Is No Fundamental Policy In Favor Of Marijuana Use

The California Supreme Court has recognized that federal law makes marijuana use illegal despite California's medical marijuana law. (*Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920.) In *Ross*, the California Supreme Court ruled employers have no duty under the Fair Employment and Housing Act ("FEHA") to accommodate an employee's use of marijuana under the CUA and the MMPA. (*Id.*)

The court considered two issues in the case – first, whether FEHA requires a "reasonable accommodation" for the use of medical marijuana, and second, whether an employee fired for lawfully using marijuana may sue for wrongful termination in violation of public policy. Ross argued, "[j]ust as it would violate the FEHA to fire an employee who uses insulin or Zoloft,... it violates [the] statute to terminate an employee who uses a medicine deemed legal by the California electorate upon the recommendation of his physician." (*Id.*, at p. 926.)

The California Supreme Court, however, determined that the CUA did not make marijuana a prescription drug because "[n]o state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law, even for medical users... ." (*Id.* at p. 926.) The court also ruled that the CUA did not modify existing employment laws, but merely created limited protections from criminal prosecution for qualified patients and caregivers. (*Id.* at pp. 926-927.) Accordingly, the court ruled that Ross' termination did not violate public policy, because there was no "fundamental public policy" to protect. (*Id.* at p. 932 [emphasis added].) Stated simply, marijuana use is not a constitutional right, is not protected by a "fundamental public policy," and remains illegal under federal law regardless of California's medical marijuana law.

C. There Is No Statutory Right To Use Or Distribute Marijuana

The California Supreme Court recognized California could not legalize the use or distribution of marijuana because it remains illegal under federal law. (*Ross*, *supra*, 42 Cal.4th. at p. 926.) For this reason, courts have consistently held the enactment of California's medical marijuana laws only decriminalize certain medicinal use and do not alter the fact that there is no fundamental state or federal right to use or distribute marijuana. For example, in *Gonzales v. Raich* (2005) 545 U.S. 1, 27, the United States Supreme Court held that the Controlled Substances Act (21 U.S.C. §§ 801 et seq.) outlaws any medical marijuana use notwithstanding California's CUA. (*Id.*) In *United States v. Cannabis Cultivator's Club*, *supra,* 1999 U.S. Dist. LEXIS 2259, defendants, members of a cannabis cooperative, sought a judicial declaration that they had a fundamental right to use medical marijuana to alleviate their suffering. The district court rejected defendants' argument, and stated defendants did not have a constitutional right to obtain marijuana from a medical cannabis cooperative free of government police power. (*Id.* at pp. *2-*3 [citing *Carnohan v. United States* (9th Cir. 1980) 616 F.2d 1120, 1121].)

Also, Appellants cannot claim any vested right to use or distribute marijuana, for the reasons discussed in this section, even if they had invested substantial amounts of money into their marijuana distribution

facilities. (See *Avco Community Developers v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 793.)

D. State Law Supports The Injunction Entered Here

1. The CUA and MMPA Are Narrowly Drawn To Provide Affirmative Defenses To Criminal Prosecution

Neither the CUA nor the MMPA creates a right to operate, or any duty upon the City to permit marijuana distribution facilities: "The Compassionate Use Act created a limited *defense* to crimes, not a constitutional *right* to obtain marijuana." (*People v. Urziceanu*, *supra*, 132 Cal.App.4th at p. 774 [emphasis added].) The affirmative criminal defense in the CUA is "limited to the narrow circumstances approved by the voters enacting section 11362.5, and does not allow the importation or cultivation of marijuana by large commercial enterprises ... ." (*Id.* [quoting *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1400].) The CUA was not intended to be "a sort of 'open sesame' regarding the possession, transportation and sale of marijuana in this state." (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1546.)

Health and Safety Code section 11362.5, subdivision (b)(1)(A), is purely descriptive and, while it states the CUA's purpose, it imposes no requirements or limitations on any state or local agencies. Section 11362.5, subdivision (b)(1)(B), shows that the intended purposes for the CUA are

limited, given that it seeks only to protect patients and their qualified caregivers from criminal prosecution. Section 11362.5, subdivision (b)(1)(C), shows that, to the extent the CUA addresses distribution of medical marijuana, it only encourages, but does not require, the establishment of safe distribution schemes. *That matter remains a local land use prerogative.*

The CUA contains only two immunizing provisions, neither of which legalizes marijuana nor purports to require that local governments provide access to it. First, the CUA prevents physicians from being punished or denied any right or privilege for recommending the use of medical marijuana to a patient. (§ 11362.5, subd. (c).) This subsection only protects physicians from criminal and administrative penalties, and thus has nothing to do with regulation by local governments or with Appellant. Second, the CUA provides narrow, enumerated immunities to criminal prosecution for possession and cultivation of marijuana by patients or their primary caregivers acting on the recommendation of a physician. (§ 11362.55, subd. (d).) These limited provisions make it clear there is no legally enforceable duty for cities to permit marijuana distribution facilities.

2. The California Supreme Court Has Stated The CUA And MMPA Are Not To Be Extended Beyond Their Narrow Purpose Of Providing An Affirmative Defense To Criminal Prosecution Under State Criminal Law

The California Supreme Court affirmed the narrow scope of the CUA in *Ross v. RagingWire Telecommunications Inc.*, *supra*, 42 Cal.4th 920, refusing to apply it in the context of employment law. There, plaintiff followed his doctor's recommendation and treated his back spasms by smoking marijuana. He was fired for marijuana use. (*Id.* at pp. 924-925.) Plaintiff alleged his termination violated the Fair Employment and Housing Act, and public policy. (*Id.* at p. 924.) The California Supreme Court affirmed the sustaining of RagingWire's demurrer, emphasizing that, by enacting Proposition 215 and, then, the CUA, "California's voters merely exempted medical users and their primary caregivers from criminal liability under two specifically designated state statutes. Nothing in the text or history of the Compassionate Use Act suggests the voters intended the measure to address the respective rights and obligations of employers and employees." (*Id.* at p. 926.) The court reasoned that the CUA was not intended to apply to employment law because its "operative provisions do not speak to employment law." (*Id.* at p. 928.) "Neither is employment law mentioned in the findings and declarations that precede the Compassionate Use Act's operative provisions." (*Ibid.*) The court thus concluded:

> "[G]iven the Compassionate Use Act's modest objectives and the manner in which it was presented to the voters for adoption, we have no reason to conclude the voters intended to speak so broadly, and in a context so far removed from the criminal law, as to require

> employers to accommodate marijuana use. As another court has observed, 'the proponents' ballot arguments reveal a delicate tightrope walk designed to induce voter approval, which we would upset were we to stretch the proposition's limited immunity to cover that which its language does not."

(*Id.* at p. 930 [quoting *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1152].)

The court's reasoning in *Ross* supports the fact that nothing in the text or history of the CUA or MMPA suggests they were intended to address local land use and licensing issues, given that their operative provisions do not mention those areas of the law. (*Id.* at p. 928.) Nor are the principles of zoning or licensing referenced in the findings and declarations that precede the CUA's substantive provisions. (*Ibid.*) In fact, as shown below, the Legislature has now made it unequivocally clear, in Health and Safety Code section 11362.768 and 11362.83, that cities and counties are not preempted by the CUA or MMPA from enacting restrictions upon marijuana distribution facilities.

3. The MMPA Does Not Create A Duty Upon Cities To Permit Marijuana Distribution Facilities

The MMPA, like the CUA, does not create a right to establish a marijuana distribution facility, and makes no mention of land use or licensing. While the MMPA expands on the CUA in certain respects, it does so only within narrowly drawn limits, i.e., with respect to the use of marijuana by qualified patients and their designated caregivers. The

MMPA nowhere purports to restrict or usurp the police power of local governments to enact zoning and land use regulations regarding or affecting the cultivation and use of medical marijuana.

The MMPA creates a voluntary program for the issuance of identification cards to qualified patients (§ 11362.7-76); provides for affirmative defenses to certain specifically enumerated criminal offenses (§ 11362.765); quantifies the amount of marijuana a qualified patient may possess (§ 11362.77; but see *People v. Kelly* (2010) 47 Cal.4th 1008); extends criminal affirmative defenses to qualified patients, persons with valid identification cards, and the primary caregivers who associate to "collectively or cooperatively cultivate marijuana for medical purposes" (§ 11362.775); provides that employers need *not* accommodate the medical use of marijuana (§ 11362.785); and identifies locations where smoking of marijuana is prohibited (§ 11362.79).

Like the CUA, the MMPA does not mention store front marijuana distribution facilities, nor does it require local land use laws to accommodate such uses. Although section 11362.775 does refer to the "collective" and "cooperative" cultivation of marijuana for medical purposes, this statute only affords an affirmative criminal defense to individuals charged with the crime of violating the Health and Safety code provisions enumerated therein. The MMPA nowhere provides that groups

engaged in the collective or cooperative cultivation of marijuana have a right to establish and operate a marijuana distribution facility – as Appellant has – for purposes of engaging in that activity, let alone *require* local governments to issue permits, licenses or zoning designations to persons seeking to distribute marijuana.

E. The Recent Enactment Of Health And Safety Code Section 11362.768 Evidences The Legislature's Intent To Leave Regulation Of Marijuana Distribution Facilities To Local Governments

1. Section 11362.768 Shows The CUA and MMPA Do Not Preempt Cities From Exercising Their Land Use Authority To "Restrict" Marijuana Distribution Facilities

When it enacted Health and Safety Code section 11362.768,[5] the Legislature made a finding that "establishing a uniform standard regulating the proximity of medical marijuana cooperatives, collectives, dispensaries, operators, establishments, or providers to schools is a matter of statewide concern and not a municipal affair, as that term is used in Section 5 of Article XI of the California Constitution. Therefore, this act shall apply to all cities and counties, including charter cities and charter counties." (Stats 2010, ch. 603.) The Section indicates the Legislature's intent to establish a statewide minimum distance requirement to keep marijuana distribution

[5] Assembly Bill Number 2650 was approved by the Governor and filed with the Secretary of State on September 30, 2010. It became effective on January 1, 2011.

facilities away from schools. More importantly, however, the Section also provides that cities may enact their own ordinances to further restrict marijuana distribution facilities.[6]

The statute restricts the location of medical marijuana cooperatives, collectives, dispensaries, operators, establishments, or providers who possess, cultivate, or distribute medical marijuana under the Medical Marijuana Program. Specifically, they cannot be located "within a 600-foot radius of a school." (See also *Hill*, *supra*, 192 Cal.App.4th at p. 866].)

The statute further specifies the entities and individuals to which this code section shall apply and which ones are exempt. Notably, it does not apply to "a licensed residential medical or elder care facility." (§ 11362.768, subd. (d).) The section applies "only to a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider that is authorized by law to possess, cultivate, or distribute medical marijuana and that has a storefront or mobile retail outlet which ordinarily requires a local business license." (§ 11362.768, subd. (e).)

More important for the instant case, the statute then addresses the

---

[6] Subsection (g), discussed further, *infra*, assumes that some cities and counties *already* regulated the location or establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider because it expressly provides that nothing in Section 11362.768 "shall preempt local ordinances, adopted *prior to* January 1, 2011. . . ." (§ 11362.768, subd. (g) [emphasis added].)

ability of a city, such as Temecula, to adopt particular ordinances. Accordingly, there can be no preemptive effect of California's CUA and MMPA on local ordinances restricting marijuana distribution facilities. (§ 11362.768, subd. (f); *Hill*, *supra*, 192 Cal.App.4th at p. 868.)

With respect to the Legislature's intention to allow local governments to regulate marijuana distribution facilities, two subsections of Section 11362.768 are of particular relevance.

Subdivision (f) unequivocally establishes the Legislature did not preempt cities and counties from exercising their land use authority over marijuana distribution facilities:

> *"(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."* [Emphasis added.]

The Legislature left no doubt that a city, such as Temecula, has the authority to adopt more restrictive ordinances governing the location and establishment of marijuana distribution facilities, not just to schools, but in the first instance. Further, by including the word "establishment," the Legislature implicitly included the City's right not to permit marijuana distribution facilities at all. The plain meaning of subsection (f) is, among other things, to permit local governments to determine whether they wish to allow marijuana distribution facilities within their borders.

The other subdivision relevant here is subdivision (g), which provides:

> "(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."

As in subsection (f), the Legislature could not be more clear in stating there is no preemption of local government land use authority – the City of Temecula had the power when it adopted its ordinance to determine whether to allow the establishment of a marijuana distribution facility at all. By expressing its intention not to preempt pre-January 1, 2011 ordinances that regulate the establishment of marijuana distribution facilities, the Legislature "grandfathered" in schemes such as the City's that go so far as to regulate the operation of such facilities. In sum, Section 11362.768 demonstrates the Legislature's recognition that localities already may have taken different approaches to regulation of marijuana distribution facilities or may wish to do so in the future, and, as to their location or establishment, the Legislature intended no preemption.

2. The Legislative History Of Health And Safety Code Section 11362.768 Further Supports Local Regulation Of Marijuana Distribution Facilities

When it was first introduced, A.B. 2650 did not expressly address its

effect upon local land use ordinances.[7] Concerns were expressed that the bill might unduly restrict local regulatory authority. The first Assembly Committee report stated that "[s]ince the passage of SB 420 in 2003, much of the medical marijuana regulation has been determined by local jurisdictions better equipped to resolve issues related to the unique nature of its city or county,"[8] (emphasis added) and even medical marijuana supporters criticized that "[t]his legislation usurps the authority of local governments to make their own land-use decisions."[9] The letter also states:

> "Furthermore, local land use decisions are best made by City Councils and County Boards of Supervisors based on the individual circumstances in the Community. Usurping this local authority with an arbitrary statewide limit will interfere with the ability of local governments to use their discretion in developing the kinds of regulations that are already proven to protect legal patients and the community at large. Land use issues related to these associations should continue to be made at the local level – just like those for other legal businesses or organizations."[10]

The Bill's author responded by clarifying that A.B. 2650's preemptive intent was limited. Notably, it was to "provide[] local jurisdictions necessary guidance while allowing them to construct a more

---

[7] Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Apr. 8, 2010, Request for Judicial Notice, Ex. A.

[8] Assem. Pub. Saf. Com., analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Apr. 8, 2010, p. 7, Request for Judicial Notice, Ex. B.

[9] Assem. Pub. Saf. Com., analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Apr. 15, 2010, p. 9, Request for Judicial Notice, Ex. C, quoting Marijuana Policy Project comment letter.

[10] Id. at pp. 10-11, quoting Americans for Safe Access comment letter.

restrictive ordinance."[11] The author then incorporated this intent into two savings clauses, subdivisions (f) and (g) of proposed Health and Safety Code section 11362.768, discussed *supra*, which remain in the statute as adopted.[12] These provisions effectively favor restrictive local regulations by allowing local governments to construct "a more restrictive ordinance" at any time, but "set[ting] a January 1, 2011 deadline for adopting any local ordinance that is *less* restrictive than AB 2650."[13] [Emphasis added.]

Subsequent committee reports offered detailed discussions of the local police power and questioned whether any state interference with that plenary authority in this area was appropriate.[14] Significantly, it was never suggested during the legislative process that the existing provisions of the MMPA preempt local authority to regulate marijuana-related land uses.

---

[11] Assem. Com. On Appropriations, analysis of Assem. Bill. No. 2650 (2009-2010 Reg. Sess.) as amended Apr. 15, 2010, p. 1, Request for Judicial Notice, Ex. D.

[12] See Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended May 28, 2010, p. 3, Request for Judicial Notice, Ex. E; Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Jun. 10, 2010, p. 3, Request for Judicial Notice, Ex. F.

[13] Sen. Loc. Gov. Com., analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess. as amended Jun. 10, 2010, pp. 4-5, Request for Judicial Notice, Ex. F; Request for Judicial Notice Ex. D, supra, Assem. Com. On Appropriations, analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Apr. 15, 2010, p. 1.) See also Sen. Pub. Saf. Com., analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess.), as amended Jun. 10, 2010, p. D, Request for Judicial Notice, Ex. H.)

[14] Request for Judicial Notice Ex. G, *supra*, Sen. Loc. Gov. Com., analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Jun. 10, 2010; Request for Judicial Notice Ex. H, supra, Sen. Pub. Saf. Com., analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Jun. 10, 2010.

Rather, the legislative committee reports repeatedly stressed the breadth of the local police power in this area and the desirability of minimizing state interference.[15] The Legislature acted on this understanding, crafting the provisions of A.B. 2650 to preserve local authority to enact more restrictive ordinances. These efforts would have been pointless, and the savings clauses of subdivisions (f) and (g) mere surplusage, if the MMPA already preempted all more restrictive local regulations upon marijuana-related land uses. A.B. 2650's savings clauses demonstrate the Legislature's unwillingness to intrude upon local government power to more closely regulate and restrict marijuana-related land uses.

3. In Enacting Section 11362.768, The Legislature Implicitly Approved Of The Court of Appeal Decisions In *City of Claremont v. Kruse*[16] and *City of Corona v. Naulls*[17]

Case authority holds that the Legislature is presumed to know and approve of existing law at the time it passes legislation. (*Nelson v. Pearson Ford Co.* (2010) 186 Cal.App.4th 983, 1008 ["the Legislature is presumed

---

[15] See, e.g., Request for Judicial Notice Ex. G, *supra*, Sen. Loc. Gov. Com., analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Jun. 10, 2010, p. 4 ["Local land use decisions that strike a delicate balance between protecting school children and ensuring that patients and caregivers can obtain medical marijuana are best made by city and county officials . . . The Committee may wish to consider whether AB 2650 substitutes an arbitrary, one-size-fits-all standard for local officials' informed judgments about their communities."].

[16] (2009) 177 Cal.App.4th 1153 ("*Kruse*").

[17] (2008) 166 Cal.App.4th 418 ("*Naulls*").

to be aware of existing laws and judicial decisions and to have enacted or amended statutes in light of this knowledge [citation] . . . ."].) The California Supreme Court has held: "[W]hen, as here, the Legislature undertakes to amend a statute which has been the subject of judicial construction[, i]n such a case it is presumed that the Legislature was fully cognizant of such construction, and when substantial changes are made in the statutory language it is usually inferred that the lawmakers intended to alter the law in those particulars affected by such changes." (*Palos Verdes Faculty Ass'n v. Palos Verdes Peninsula Unified School Dist.* (1978) 21 Cal.3d 650, 659.)

The Legislature's addition of Section 11362.768, particularly subsections (f) and (g), is consistent with the earlier holdings in *Kruse* and *Naulls*, which recognized the authority of the local governments in those cases to restrict marijuana distribution facilities through zoning or other ordinances. The Second District Court of Appeal's recent decision in *Hill* is consistent with the Legislature's intent, stating: "If there was ever any doubt about the Legislature's intention to allow local governments to regulate marijuana dispensaries, and we do not believe there was, the newly enacted section 11362.768 has made clear the local governments may regulate dispensaries." (192 Cal.App.4th at p. 868.) Subsequent construction of a statute by courts "becomes as much a part of the statute as

if it had been written into it originally." (*People v. Hallner* (1954) 43 Cal.2d 715, 720.) And when legislative history is consistent with judicial construction of the statute, the principle of legislative acquiescence is all the more persuasive and indicative of the Legislature's intent. (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 735.)

4. In Amending Section 11362.83, The Legislature Implicitly Approved Of The Court of Appeal Decisions In *Kruse* and *Naulls*

On August 31, 2011, the Governor signed legislation that amended the MMPA to confirm that municipalities in California retain broad power to regulate or ban marijuana distribution facilities within their borders. Assembly Bill 1300 now clarifies that the MMPA in no way limits a local government's power to adopt and enforce its own laws by providing as follows:

> "Nothing in [the MMPA] 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." [Emphasis added.]

A.B. 1300, amending Health and Safety Code section 11362.83, became effective on January 1, 2012.

On September 20, 2011, the Governor confirmed the above

interpretation of A.B. 1300 when he vetoed S.B. 847,[18] stating: "I have already signed AB 1300 that gave cities and counties authority to regulate medical marijuana dispensaries – an authority I believe they already had. [¶] This bill [S.B. 847] goes in the opposite direction by preempting local control and prescribing the precise locations where dispensaries may not be located. *Decisions of this kind are best made in cities and counties, not the State Capitol.*"[19] (Emphasis added.)

F. The Temecula Municipal Code Is Not Preempted By California's Marijuana Laws

"The party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption." (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1242 [citing *Big Creek Lumber Co. v. County of Santa Cruz*, *supra*, 38 Cal.4th at p. 1149].) Respondents have not met their burden; they failed to establish the existence of preemption based on the current, well-established case law discussed below.

1. Neither Express Nor Implied Preemption Applies

The Temecula Municipal Code does not duplicate, contradict or interfere with California's marijuana laws, or otherwise impede their

---

[18] S.B. 847 proposed to amend Section 11362.768 to provide a distance requirement from residential uses to a marijuana cooperative, collective, dispensary, operator, establishment, or provider.

[19] Governor's Veto Message to Sen. On Sen. Bill No. 847 (Sept. 20, 2011) http://gov.ca.gov/docs/SB_0847/Veto_Message.pdf.

implementation. (See *Claremont v. Kruse*, *supra*, 177 Cal.App.4th at pp. 1169, 1176.) An ordinance is preempted "if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." (See *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897.) Here, none of these situations apply.

In *Kruse*, the Court of Appeal declared that neither express nor implied preemption exists in this area: "The CUA accordingly did *not* expressly preempt the City's enactment of the moratorium or the enforcement of local zoning and business licensing requirements." (*Id.* at p. 1175 [emphasis added][20] .) Further, "[t]he MMP[A] does not expressly preempt the City's actions at issue here." (*Ibid.*) As to implied preemption, "[n]either the CUA nor the MMP[A] impliedly preempts the City's actions in this case." (*Id.* at p. 1176.) As demonstrated below, while the MMPA creates a partial regulatory framework for the Compassionate Use Act, it by no means expressly or by implication occupies the field. (*Id.* at pp. 1169,

---

[20] "The general presumption against retroactive application of statutes is subordinate to 'the transcendent canon of statutory construction that the design of the Legislature be given effect.'" (*Plotkin v. Sajahtera, Inc.* (2003) 106 Cal.App.4th 953, 960 [internal citation omitted].) Before the Legislature amended the statute, Section 11362.83 stated: "Nothing in this article shall prevent a city or other local governing body from adopting and enforcing laws consistent with this article." The Legislature's amendment clarified Section 11362.83. "We have already mentioned that under certain circumstances, the Legislature may make material changes in language in an effort to clarify existing law." (*Carter v. Cal Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 929.).

1172-1177.)

a. Express Preemption

Express preemption occurs when the challenged ordinance intrudes on an area fully and expressly occupied by general law. (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 747.) It turns on whether the field the Legislature has occupied encompasses conflicting local laws. (*Big Creek Lumber*, *supra*, 38 Cal.4th at p. 1152.) The Court of Appeal in the *Kruse* case, explained in more detail below, stated:

> "'[A]bsent a clear indication of preemptive intent from the Legislature,' ***we presume that local regulation 'in an area over which [the local government] traditionally has exercised control' is not preempted by state law***. . . .[W]hen local government regulates in an area over which it traditionally exercised control, such as the location of particular land uses, California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is not preempted by state statute. [Citation.]."

(*City of Claremont v. Kruse*, *supra*, 177 Cal.App.4th at p. 1169 [emphasis added].) In rejecting defendants' contention in *Kruse*, the court stated that the Attorney General's opinion in fact "concluded that state marijuana laws 'do not expressly or impliedly preempt this entire field of regulation.'" (*Id.* [citing the opinion of the Attorney General (2005) 88 Ops.Cal.Atty.Gen. 113, 116].) The court stated, "[t]hat opinion [of the Attorney General] thus *undermines*, rather than supports defendants' position." (*Id.* [emphasis added].)

Further, the Court of Appeal in the recent *Hill* case rejected defendants' assertion that local ordinances enter an area that is fully occupied by state law, stating, "Defendants' total preemption argument fails because Section 11362.83, a part of the Medical Marijuana Program, specifically states: 'Nothing in this article shall prevent a city or other local governing body from adopting and enforcing laws consistent with this article.'" (192 Cal.App.4th at p. 864.) The court concluded that Section 11362.83 "allows a county to regulate the establishment of [marijuana distribution facilities] and their locations so long as those regulations are consistent with the provisions of the Medical Marijuana Program, Sections 11362.7 through 11362.9." (*Id.* at p. 867) There is no reason for a city to be treated any differently.

The recent enactment of A.B. 1300 amending the above section, together with the Governor's Veto Message, leaves no doubt that the Legislature intended no express (or implied, discussed *infra*) preemption.

b. Implied Preemption

"Implied preemption occurs when: (1) general law so completely covers the subject as to clearly indicate the matter is exclusively one of state concern; (2) general law partially covers the subject in terms clearly indicating a paramount state concern that will not tolerate further local action; or (3) general law partially covers the subject and the adverse effect

of a local ordinance on transient citizens of the state outweighs the possible municipal benefit." (*Big Creek Lumber*, *supra*, 38 Cal.4th at pp. 1157-58.) None of these circumstances applies here.

Courts do not often find the existence of implied preemption. "We are reluctant to invoke the doctrine of implied preemption. Since preemption depends upon legislative intent, such a situation necessarily begs the question of why, if preemption was legislatively intended, the Legislature did not simply say so, as the Legislature has done many times in many circumstances." (*Garcia v. Four Points Sheraton LAX* (2010) 188 Cal.App.4th 364, 374.)

Complete Coverage. The CUA and MMPA do not "completely cover" the subjects of public safety including land use, zoning and business permitting. To the contrary, they do not address them at all. California's recent amendments to the MMPA make clear the continuation of local authority in connection with public safety issues and expressly disavow any suggestion that local public safety including land use is a matter of statewide concern. The statement of voter intent in the CUA simply does not have a preemptive effect.

Any effort to transform the description of the CUA into a substantive preemption argument, that the CUA or MMPA preempt the City's public

safety decisions, must likewise fail. Moreover, the MMPA contains no findings or declarations at all. (See § 11363.7 et seq.)

Partial Coverage Foreclosing Local Action. Neither does the CUA provide partial coverage in terms indicating a paramount state concern that will not allow local public safety regulation. Even with respect to marijuana, the CUA makes no attempt to foreclose local action on the subject, except with the limited and specifically enumerated exceptions of providing immunities to two criminal drug offenses, and to foreclose punishment of physicians for recommending marijuana to their patients. (§ 11352.5(c), (d).)

Partial Coverage With Balancing. A local ordinance is not impliedly preempted by conflict with state law unless it "'mandate[s] what state law expressly forbids, [or] forbids[s] what state law expressly mandates.'" (*Big Creek Lumber*, *supra*, 38 Cal.4th at p. 1161 [quoting *Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, 866].) As the CUA and MMPA do not expressly mandate that a city or county accept a marijuana distribution facility, the City's regulations for these facilities are not preempted by state law. The Governor's Veto Message underscores this conclusion.

No Express Prohibition Of Local Regulation. Finally,

"'[p]reemption by implication of legislative intent may not be found when the Legislature has expressed its intent to permit local regulations. Similarly, it cannot be found when the statutory scheme recognizes local regulations.'" (*Big Creek Lumber, supra*, 38 Cal.4th at p. 1157 [quoting *People ex rel Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476, 485].) Here, the CUA expressly contemplates local regulation by providing that "[n]othing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes." (§ 11362(b)(2).) And, as discussed above, the MMPA provides: "Nothing in this section shall prohibit a city, county, or city and county from adopting ordinances or policies that further restrict the location or establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider." (§ 11362.768, subd. (f).) Further, the recent amendment of section 11362.83 provides: "Nothing in [the MMPA] 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." [Emphasis added.] Thus, there can be no implied preemption of local ordinances, particularly public safety ordinances whose very purpose

is to promote public health and welfare through the safe use of land and conduct of commerce.

The City's public safety determinations are matters historically left to local control and, thus, are not preempted by the CUA or MMPA. Absent a clear indication of preemptive intent from the Legislature, a reviewing court must presume that local regulation in an area over which the local government traditionally exercises control is not preempted by state law. (*Action Apartment Assn.*, *supra*, 41 Cal.4th at p. 1242; *Big Creek Lumber*, *supra*, 38 Cal.4th at p. 1149.)

It takes considerable coverage of an area to overcome the presumption against preemption of police power authority. Courts have repeatedly refused to infer field preemption of land use, from statutory schemes much more explicitly addressing land use than the MMPA. (See, e.g., *Citizens for Planning Responsibly v. County of San Luis Obispo* (2009) 176 Cal.App.4th 357, 372-373 [State Aeronautics Act]; *Big Creek Lumber*, *supra* at pp. 1157-1162 [Forest Practice Act]; *IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81 at pp. 90-96 [Hazardous Waste Control Act].)

For example, the defendants in the *Hill* case, discussed above, contended that "even if the Medical Marijuana Program does not preempt

the County's authority to regulate [medical marijuana dispensaries], the County's regulations are invalid because they are inconsistent with state law." (*County of Los Angeles v. Hill*, *supra*, 192 Cal.App.4th at p. 867.) Regarding this contention, the *Hill* Court declared, "[w]e disagree." (*Ibid.*) First, by enacting Section 11362.83, "the legislature showed it expected and intended that local governments [would] adopt additional ordinances." (*Ibid.*) Second, new Section 11362.768 "has made clear that local governments may regulate [marijuana distribution facilities]." (*Id.* at p. 868.) For over three years now, courts have held time after time that the Medical Marijuana Program Act and Compassionate Use Act do not preempt local regulations in this area.

2. The *Naulls*, *Kruse* and *Hill* Cases Confirm That State Law Does Not Preempt The Temecula Municipal Code

The *Naulls* and *Kruse* decisions, along with the recent *Hill* decision discussed herein, directly confirm the ability of a city to regulate marijuana distribution facilities under their local police power. In light of that authority, the trial court erred in declaring the criminal penalties and sunset provision are preempted by state marijuana laws.

a. *City of Corona v. Naulls*

The Court of Appeal determined that substantial evidence supported the trial court's issuance of a preliminary injunction, opining that "Naulls

did not comply with the City's requirements, failing to take any steps to obtain approval before opening his doors for business. As a consequence, operation of HNC *violated the City's municipal code* and, as such, constituted a nuisance *per se*." (*Id*., at p. 428 [emphasis added].)

Importantly, the Court of Appeal rejected Naulls' argument that the trial court erred in finding that any use not enumerated in the City's zoning code was presumptively prohibited. (*Id*., at pp. 430-31.) The City's Specific Plan listed all permissible and impermissible uses within each zoning district; neither selling nor distributing medical marijuana was among them. (*Id*., at p. 431.) A prospective licensee could apply under a "Miscellaneous" category for a Planning Commission determination of the proper zoning, if any, for such uses. (*Id*., at p. 431.) Naulls thus needed to obtain a "similar use" determination or an amendment to the Specific Plan. He did neither. The court concluded:

> "[B]y evading the procedures which applied to his situation, and with knowledge – as provided to him by a City representative both verbally and in writing-that a medical marijuana dispensary was not a permitted use, [Naulls] began operating [Healing Nations] in violation of various sections of the City's municipal code ... Naulls and [Healing Nations] created a nuisance per se pursuant to section 1.08.020, subdivision (B)."

The Naulls Court left no doubt that a local government could regulate the types of businesses it would allow within its borders. The court treated a marijuana distribution facility like any other business in

analyzing whether it should have been permitted in the City. Although there was no discussion of preemption by the CUA or MMPA, the case continues to provide support for the proposition that local entities are not prohibited from restricting or regulating businesses – including marijuana distribution facilities – within their jurisdiction.

b. *City of Claremont v. Kruse*

In *City of Claremont v. Kruse*, the Court specifically analyzed whether there was express or implied preemption by the CUA or the MMPA that would prevent local public safety regulations, such as zoning laws, from restricting the establishment of marijuana distribution facilities. (*Id.* at pp. 1172-76.) The Court of Appeal held:

> "[z]oning and licensing are not mentioned in the findings and declarations that precede the CUA's operative provisions. Nothing in the text or history of the CUA suggests it was intended to address local land use determinations or business licensing issues. *The CUA accordingly did not expressly preempt the City's enactment of the moratorium or the enforcement of local zoning and business licensing requirements.*"

(*Id.* at p. 1176 [emphasis added].)

In *Kruse*, the marijuana distribution facility at issue violated Claremont's local municipal code and was therefore held to constitute a nuisance per se. (*Id.* at p. 1166.) The court stated, "[w]e find *Naulls* persuasive here. Kruse's operation of a medical marijuana distribution facility without the City's approval constituted a nuisance per se under

section 1.12.010 of the City's municipal code and could properly be enjoined." (*Ibid.*)

Further, the court in *Kruse* noted that the trial court had found that Kruse's operation of a marijuana distribution facility was properly enjoined as a nuisance *per se* because, "notwithstanding California's medical marijuana laws, the cultivation and distribution of marijuana *remains illegal* under the federal Controlled Substances Act." (*Id.* at p. 1164 [emphasis added].) Thus, yet another court concurred with the principle that a local government could regulate the type of business at issue here within its borders.

c. Attempts To Distinguish *Kruse* and *Naulls* Fail

Attempts to distinguish *Kruse* and *Naulls* cannot succeed on the issue of local governments' right to regulate businesses within their boundaries. For example, in *Kruse*, *supra*, the marijuana distribution facility owner applied for and was denied a business license. (177 Cal.App.4th at p. 1159.) In fact, the court dismissed Kruse's appeal of the denial of his business license application as moot. (*Id.* at p. 1163.) The court instead relied on the trial court's opinion that "there is nothing in the text or history of the Compassionate Use Act that suggests that the voters intended to mandate that municipalities allow marijuana distribution

facilities to operate within their city limits, or to alter the fact that land use has historically been a function of local government under their grant of police power." (*Id.* at p. 1162.) Thus, current law already recognizes that the City can regulate Respondent.

G. The *Qualified Patients* Case Does Not Alter The Above Analysis

To the extent that Appellant relies on *Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 274 ("*Qualified Patients*"), to distinguish *Kruse* and *Naulls*, their argument lacks merit.

First, the holding in *Kruse* that local regulation of marijuana dispensaries is not preempted was not limited to temporary moratoria. Rather, the Court held that "[t]he City's enforcement of its licensing and zoning laws *and* its temporary moratorium on medical marijuana dispensaries do not conflict with the CUA or the MMP," and "Nothing in the text or history of the MMP precludes the City's adoption of a temporary moratorium on issuing permits and licenses to medical marijuana dispensaries, *or the City's enforcement of licensing and zoning requirements applicable to such dispensaries*." 177 Cal. App. 4th at 1175, 1176 (emphasis added). Moreover, the City here is not relying on any moratorium as the basis for the preliminary injunction, but instead on the zoning requirements.

Section 11362.768 does not distinguish *Kruse* or *Naulls*, but instead reaffirms local agencies' ability to regulate the location or establishment of marijuana dispensaries. (See *Hill, supra.*) As for *Qualified Patients, supra*, 187 Cal. App. 4th 734, the Court's attempt in *dicta* to distinguish *Kruse* and *Naulls* was not the holding of that case (as the Court there expressly did not rule on the validity of the City's regulation), and was factually erroneous. Neither *Kruse* nor *Naulls* was limited to a temporary moratorium. As noted above, the *Kruse* court found the moratorium, the business license, and the complete zoning ban were not preempted. (See 177 Cal. App. 4th at pp. 1175, 1176.) As for *Naulls*, that case, too, involved zoning non-conformance. (See 166 Cal. App. 4th at p. 433.)

IV. CONCLUSION

For the reasons set forth above, the League of California Cities and the California State Association of Counties support the City of Temecula in urging the Court to affirm the trial court's ruling.

Respectfully submitted,

Dated: February 23, 2012

BEST BEST & KRIEGER, LLP

By: _____
Jeffrey V. Dunn
Lee Ann Meyer

CERTIFICATION OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I certify that the League of California Cities and California State Association of Counties' Brief of *Amici Curiae* contains 9,194 words as calculated by the word count function of the word processing program used to prepare the brief.

Dated: February 23, 2012

BEST BEST & KRIEGER, LLP

By: _____
Jeffrey V. Dunn
Lee Ann Meyer
Attorneys for Amici Curiae
League of California Cities
And California State Association of Counties

PROOF OF SERVICE

At the time of service I was over 18 years of age and not a party to this action. My business address is 5 Park Plaza, Suite 1500, Irvine, California 92614. On February 23, 2012, I served the following document(s):

Application of The League of California Cities And California State Association of Counties to File Amicus Brief in Support of Respondent; Proposed Brief of Amici Curiae

☒ **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed below (specify one):

☒ Placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Irvine, California.

By e-mail or electronic transmission. Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.* **Supreme Court Only**

T. Peter Pierce
Richards, Watson & Gershon
355 South Grand Ave., 40th Floor
Los Angeles, CA 90071

Hon. Craig Riemer
Riverside County Superior Court
4050 Main Street
Riverside, CA 92501

Jonathan Roy Preston
Page Lobo Costales & Preston APC
25026 Las Brisas Road, Ste. B
Murrieta, CA 92562

Supreme Court of California
350 McAllister St.
San Francisco, CA 94102-7303
***Via Electronic Filing**

J. David Nick
345 Franklin St.
San Francisco, CA 94102

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

Executed on February 23, 2012, at Irvine, California.

Kerry V. Keefe

55136.00805\7319167.1

LAW OFFICES OF
BEST BEST & KRIEGER LLP
5 PARK PLAZA, SUITE 1500
IRVINE, CALIFORNIA 92614