IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Diana Kirby,

Plaintiff and Appellant,

v.

County of Fresno et al.,
Defendants and Respondents.

Case No. _____

After a Decision by the Court of Appeal
Fifth Appellate District Case No. F070056

Fresno County Superior Court
Case No. 14CECG00551

Petition for Review

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1. ISSUE PRESENTED FOR REVIEW

Under Article XI § 7 of the California Constitution, cities and counties "may make and enforce within [their] limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Under this provision, county and general-law city ordinances that conflict with state laws are preempted.

The County of Fresno has completely banned the storage and cultivation of medical marijuana. The issue is whether this ban conflicts with state laws authorizing qualified patients to possess and cultivate limited quantities of marijuana for personal medical use.

The case thus presents the following issue:

Whether a local ordinance completely banning individual patients from storing and cultivating medical marijuana for personal medical use conflicts with state law and is therefore preempted.

2. WHY REVIEW SHOULD BE GRANTED

This case presents a unique opportunity to resolve an issue of great public concern and statewide importance: whether qualified patients throughout California should be able to possess and cultivate limited quantities of marijuana for their personal medical use. The Court should grant review because of the importance of this issue and because the case presents a clean vehicle to settle an important question of preemption law that has divided California courts: the proper test to determine whether a local ordinance is preempted because it contradicts state law. *See* Rule of Court 8.500(b)(1).

First, the preemption issue is important not only because the County ban affects so many of its residents but also because other jurisdictions similarly seek to completely ban the cultivation of medical marijuana. The City of Fresno also completely bans the storage and cultivation of medical marijuana by qualified patients. *See Byrd v. Cnty. of Fresno*, No. F070597, 2015 WL 7753006, at *1 (Cal. Ct. App. Dec. 1, 2015) (unpublished) (review filed). Other jurisdictions are considering bans.[1]

Second, review is necessary to resolve a split in authority as to the proper test for contradiction preemption under Article XI § 7 of the California Constitution. This Court has consistently held that local laws that "contradict" state law are preempted. *E.g., City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.*, 56 Cal.4th 729, 743 (2013); *Action Apartment Ass'n, Inc. v. City of Santa Monica*, 41 Cal.4th 1232, 1243 (2007); *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal.4th 893, 898 (1993). But, as the court below noted, it has employed two completely different tests to determine whether local law contradicts state law; the choice of tests often determines the outcome of the case. *See* Slip Op. at 12.

One line of cases stretching back nearly a century holds that contradiction preemption invalidates ordinances that prohibit

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[1] http://www.sanluisobispo.com/opinion/editorials/article51852445.html; http://www.lassennews.com/story/2015/12/08/news/council-bans-medical-marijuana-gardens-in-susanville/528.html; http://www.latimes.com/socal/daily-pilot/news/tn-dpt-me-1111-marijuana-ordinance-20151110-story.html.

what a state "statute permits or authorizes." *Inland Empire*, 56 Cal.4th at 763 (Liu, J., concurring). Under this test, a local ordinance that bars individuals from exercising a privilege granted to them by state law or otherwise interferes with the purposes of state law are preempted. *See, e.g., id.*; *Action Apartment Ass'n, Inc. v. City of Santa Monica*, 41 Cal.4th 1232, 1242-44 (2007) (invalidating ordinance that was "inimical to the important purposes" of a state statute and "cut against" that statute's "core purpose"); *Int'l Bhd. of Elec. Workers v. City of Gridley*, 34 Cal.3d 191, 202 (1983); *City of Torrance v. Transitional Living Centers for Los Angeles, Inc.*, 30 Cal.3d 516, 520 (1982); *Ex parte Daniels*, 183 Cal. 636, 641-48 (1920).

In recent decades, however, this Court has also articulated another test under which the "contradictory and inimical form of preemption does not apply unless the ordinance directly requires what the state statute forbids or prohibits what the state enactment demands." *Inland Empire*, 56 Cal.4th at 743. Under this test, no preemption exists if it is "reasonably possible to comply with both the state and local laws" by completely avoiding the activity in question. *Inland Empire*, 56 Cal.4th at 743, 754. This test is significantly narrower, and applying it will often result in upholding a local ordinance that would be preempted if the other one were applied. For example, in *Action Apartment Association* the majority invalidated a local law under the first test, but the dissent would have upheld it under the second. *Compare Action Apartment Ass'n*, 41 Cal.4th at 1243-44, 1249-50 *with id.* at 1253 (Corrigan, J., dissenting).

Decisions from the Court of Appeal have taken both approaches. As discussed below, cases that apply the broader rule sometimes find preemption, while those applying the narrower rule rarely if ever do. *Compare, e.g.*, *Harrahill v. City Of Monrovia*, 104 Cal.App.4th 761, 769 (2002) (upholding truancy ordinance under narrow test) *with id.* at 772-73 (Mosk, J., dissenting) (law preempted under broader test).

The court below noted this split and that the "impossibility-of-simultaneous-compliance test used in *Inland Empire* appears to be more difficult to meet than the test used previously" by this Court. Slip Op. at 12. It chose to apply the narrower rule, *id.*, and upheld most of the ordinance, invalidating only some of the criminal provisions under a different prong of preemption. *See id.* at 15-20.

California should not have two competing rules of constitutional law that lead to contradictory outcomes. The narrow rule conflicts with nearly a century of precedent and is inconsistent with the constitutional text: as federal preemption cases recognize, a local law that prohibits what state law authorizes conflicts with that state law in any usual sense of the term. *See Inland Empire*, 56 Cal.4th 729, 764 (Liu, J., concurring). Finally, if applied consistently, the narrow rule would allow local governments to completely prohibit Californians from engaging in activities that state law expressly authorizes. It would also allow local governments to indiscriminately abridge state law rights, because "rights" are generally phrased as "authorizations" rather than as

"commands". This is likely why some courts continue to apply the broader rule, even though it contradicts this Court's recent opinions.

As discussed below, under the correct test, the County's absolute bans on the storage and cultivation of medical marijuana by individual patients for their personal medical use contradicts state law, both the voter-enacted Compassionate Use Act and the 2004 Medical Marijuana Program, which specifically states that qualified patients "may possess" and "may cultivate" specified quantities of marijuana for medical use. Health & Safety § 11362.77. Courts have consistently invalidated ordinances that completely prohibit individuals from doing what state law specifically says they "may" do.

This Court should resolve the split of authority and hold that *Daniels* and *Action Apartment Association*, not *Sherwin-Williams*, set for the proper test for contradiction preemption.

Plaintiff notes that the Petition for Review in *Byrd v. County of Fresno and City of Fresno* raises the same preemption issue as in this case, as well as the related question of whether charter cities have more authority than counties or general-law cities to regulate medical marijuana. *See Byrd v. Cnty. of Fresno*, No. F070597, 2015 WL 7753006, at *1 (Cal.Ct.App. Dec. 1, 2015) (unpublished).

3. FACTS AND PROCEDURAL HISTORY

The Court of Appeal accurately stated the facts: Plaintiff Diana

> Kirby lives in an unincorporated area of Fresno County. She has a physician's recommendation for the medical use of

> marijuana and alleges she is a "qualified patient" as defined by [California law]. Kirby was in a serious accident in 1972 and lost her left leg, broke her back in three places, shattered her face and lost sight in her left eye. She is allergic to pain medications and her chronic pain is treatable only with cannabis as recommended by her physician.
>
> Prior to the adoption of County's ordinance, Kirby relied on the provisions of section 11362.77 to cultivate within her personal residence six or fewer marijuana plants for personal medicinal use.

Slip Op. at 3-4 (footnote omitted).

Ms. Kirby sued to invalidate the ordinance, arguing that it is preempted by state law. *Id.* at 2. The County demurred, and the superior court sustained the demurrer without leave to amend. *Id.* Ms. Kirby appealed.

The Court of Appeal upheld all aspects of the ordinance except for one provision that makes violations of it a misdemeanor. It held that this criminal provision was inconsistent with "Legislature's intent to fully occupy the area of criminalization and decriminalization of activity directly related to marijuana." *Id.* at 19. However, because the ordinance declares that a violation is a public nuisance, *id.* at 5, the court held that violations of the ordinance could still be criminally prosecuted under the state's public-nuisance statutes. *Id.* at 20. These statutes make it a misdemeanor to "maintain[] or commit[] any public nuisance" or to fail to abate any public nuisance after being ordered to do so. Penal Code §§ 372, 373a.

In evaluating the ordinance's civil penalties, the Court of Appeal did not specifically apply any of the preemption doctrines it outlined at the start of its opinion. *Compare* Slip Op. at 10-15

(preemption doctrine) *with id.* at 23-31 (application to ordinances). Instead, it analyzed the issue as one of whether state law creates a right to cultivate marijuana, and rested its holding on the proposition that the County ban was a regulation of land use, even though it applies to a patient who would grow a single plant in a pot in her bedroom, or store a few grams quantity of marijuana in her purse. *See id.* at 30. It also placed great weight on what it described as this Court's narrow reading of the CUA and its conclusion that the MMP lacks a "clear indication of preemptive intent." *Id.* at 23-24, 30.

The court also rejected the County's argument that federal law gave it the authority to ban medical marijuana. *See id.* at 20-23.

Neither party moved for rehearing. The Court of Appeal's opinion is certified for publication and reported as *Kirby v. Cnty. of Fresno*, 242 Cal.App.4th 940 (2015).

4. STANDARD OF REVIEW

In this appeal from the grant of a demurrer without leave to amend, this Court assumes the truth of all material facts plead in the complaint and determines *de novo* whether the complaint states a cause of action. *McCall v. PacifiCare of California, Inc.,* 25 Cal.4th 412, 415 (2001). *De novo* review is also appropriate because the question of whether state law preempts a local ordinance presents a purely legal issue. *State Bldg. & Const. Trades Council of Cal., AFL-CIO v. City of Vista,* 54 Cal.4th 547, 558 (2012); *Johnson v. City & Cnty. of San Francisco,* 137 Cal.App.4th 7, 12 (2006).

5. LEGAL BACKGROUND: STATE MARIJUANA LAW AND THE LOCAL ORDINANCE

An analysis of whether the local ordinance conflicts with state law must begin with those laws.

5(A) State law has long regulated the cultivation, possession, and storage of marijuana.

California state law has regulated marijuana since 1913. *See Gonzales v. Raich,* 545 U.S. 1, 5-6 (2005). Since 1972, marijuana possession and cultivation have been prohibited by Health & Safety Code sections 11357 and 11358, respectively (all undesignated statutory references are to the Health & Safety Code). The term "marijuana" includes "all parts of the plant Cannabis sativa L., whether growing or not," except mature stalks, fiber, and sterile seeds. § 11018.

Possession of less than 28.5 grams of marijuana is an infraction; possession of more than that amount is a misdemeanor. § 11357(b), (c). Cultivation carries a maximum punishment of three years in jail. § 11358. Buildings and other places used for "storing, keeping, [or] manufacturing" (*i.e.*, growing[2]) marijuana are subject to civil abatement. § 11570. Marijuana is also subject to forfeiture. § 11470(a).

5(B) The voters enacted the 1996 Compassionate Use Act (CUA) to allow access to medical marijuana.

In 1996, the voters adopted the CUA to "ensure that seriously ill Californians have the right to obtain and use marijuana for

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[2] Growing marijuana is manufacturing it. *See United States v. Bernitt*, 392 F.3d 873, 879 (7th Cir. 2004).

medical purposes." CUA § 1, codified as Health & Safety Code § 11362.5(b)(1)(A) (a copy of the CUA's ballot materials are attached to this Petition under Rule of Court 8.504(e)(1)(C)). The Legislative Analyst informed the voters that the initiative would "amend[] state law to allow persons to grow or possess marijuana for medical use when recommended by a physician." Individual cultivation is integral to the measure's purpose: as the ballot arguments in favor of the CUA explained, the law "allows patients to cultivate their own marijuana … because federal laws prevent the sale of marijuana, and a state initiative cannot overrule those laws."

To accomplish its objectives, the initiative created a medical defense to California's then-existing laws "relating to the possession … and … cultivation of marijuana":

> Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.
>
> CUA § 1, codified as § 11362.5(d).

Nothing in the CUA grants local jurisdictions any authority to ban the personal use, possession, or cultivation of medical marijuana. There is no indication that any local jurisdiction in this state banned or regulated the cultivation of marijuana before the CUA was enacted.

5(C) **The Legislature enacted the 2004 Medical Marijuana Program (MMP) to further expand access to medical marijuana and promote uniformity throughout the state.**

In 2004, the Legislature expanded the protections for medical-marijuana use by enacting the Medical Marijuana Program, § 11362.7 *et seq*. The MMP is intended to "promote uniform and consistent application of the [CUA] among the counties within the state." *Inland Empire.* 56 Cal.4th 729, 744 (2013) (quoting Stats. 2003, ch. 875, § 1(b)).

The MMP is more detailed than is the CUA. Most relevant to this matter, whereas the text of the CUA authorizes patients to grow and possess a "reasonable amount" of marijuana without being subject to certain sanctions, *People v. Kelly*, 47 Cal.4th 1008, 1017, 1028 (2010), the MMP affirmatively authorizes them to cultivate and grow specific quantities of medical marijuana: a

> qualified patient or primary caregiver *may possess* no more than eight ounces of dried marijuana per qualified patient. In addition, a qualified patient or primary caregiver *may also maintain* no more than six mature or 12 immature marijuana plants per qualified patient.
> § 11362.77(a) (emphasis added).

This provision applies to patients and caregivers as defined by the CUA regardless of whether they obtain an official MMP identification card. *See Kelly*, 47 Cal.4th at 1024-25; *id.* at 1016-17 & n.9.

The MMP provides additional protection to patients who *do* take the additional step of obtaining an official medical card; they are immune from "arrest for possession, transportation, delivery, or cultivation of medical marijuana" in amounts authorized by the MPA. § 11362.71(e); *see Kelly*, 47 Cal.4th at 1014.

The MMP expressly authorizes cities and counties to pass laws "allowing qualified patients or primary caregivers to exceed the state limits," but it does not authorize local governments to impose lower limits. § 11362.77(c). Thus, "the amounts set forth in [§ 11362.77(a)] were intended 'to be the threshold, not the ceiling'" of what qualified patients may lawfully possess or grow. *People v. Wright*, 40 Cal.4th 81, 97 (2006) (citing legislative history).

The MMP also expressly authorizes local governments to establish civil or criminal regulations of medical-marijuana cooperatives and dispensaries. §§ 11362.768(f), (g), 11362.83(a), (b). It does not include any corresponding authorization to regulate cultivation or possession by individual patients.

5(D) The County ordinance prohibits the cultivation and storage of medical marijuana.

Since 2014, the County of Fresno has completely banned medical-marijuana cultivation: "Medical marijuana cultivation is prohibited in all zone districts in the County." Fresno County Ord. § 10.60.060.[3] Marijuana has "the same definition as in California Health & Safety Code Section 11018," which, as noted above, defines the term to include "all parts of the plant Cannabis sativa L." *Id.* § 10.60.030(B). "Medical marijuana" means "marijuana used for medical purposes" under the MMP. *Id.* § 10.60.030(C).

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[3] The County ordinance is available at https://www.municode.com/library/ca/fresno_county/codes/code_of_ordinances?nodeId=FRCOORCO.

The ordinance defines "cultivation" very broadly to include not just planting and growing but also marijuana storage: "'Cultivate' or 'cultivation' is the planting, growing, harvesting, drying, processing, or *storage* of one or more marijuana plants *or any part thereof* in any location." *Id.* § 10.60.030(D) (emphasis added). The ordinance does not contain any definition of the term "storage" that would suggest it means anything other than its dictionary definition: "the state of being kept in a place when not being used."[4] It thus prohibits the possession of any marijuana that is not currently being used (the state definition makes clear that "any part" of a marijuana plant means any marijuana).

Under the ordinance, the "establishment, maintenance, or operation of any prohibited cultivation of medical marijuana, as defined in this chapter, within the County is declared to be a public nuisance and each person or responsible party is subject to abatement." *Id.* § 10.60.070. Public officials are authorized to "remove, demolish, raze or otherwise abate" medical marijuana. *Id.* § 10.62.090.

Violations are punishable by a civil fine of $1000 per plant, plus additional fines of $100 per day that each plant remains in violation of an abatement order. *Id.* § 10.64.040(A). Unpaid fines accrue 10% interest per month (313% annually). *Id.* 10.64.080(A). Violations are also misdemeanors under § 10.60.080(A) and Penal

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[4] Merriam–Webster OnLine definition of "storage," available at http://www.merriam-webster.com/dictionary/storage?show=0&t=1422467656; *see Pope v. Superior Court*, 136 Cal.App.4th 871, 876-77 (2006) (dictionary definitions demonstrate unambiguous meaning of local ordinance).

Code sections 372 and 373a, which make all public nuisances misdemeanors. *See Bd. of Sup'rs of L.A. Cnty. v. Simpson*, 36 Cal.2d 671, 674-75 (1951).

The ordinance also "continue[s] in effect Fresno County's prohibition of medical marijuana dispensaries." County Ord. § 10.60.010; *see id.* § 10.60.050.

6. ARGUMENT

6(A) This Court Should Resolve the Split of Authority and Hold that *Daniels* and *Action Apartment Association*, not *Sherwin-Williams*, set forth the proper test for contradiction preemption.

"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. This provision is both a grant of, and a limitation upon, the police power of local governments in the state. *In re Sic*, 73 Cal. 142, 148 (1887), *overruled on other grounds by Ex parte Lane*, 58 Cal.2d 99 (1962). Thus, "[i]f otherwise valid local legislation conflicts with state law, it is preempted by such law and is void." *O'Connell v. City of Stockton*, 41 Cal.4th 1061, 1067 (2007).

A conflict exists if the local legislation (1) duplicates, (2) contradicts, or (3) enters an area fully occupied by general law, either expressly or by legislative implication. *Id.* at 1067.

Although this case turns primarily on the second of these three prongs – contradiction preemption – a brief discussion of the two other types of preemption is necessary to provide context for the application and limitations of that prong.

6(A)(1) Duplication Preemption

"A local ordinance *duplicates* state law when it is 'coextensive' with state law." *O'Connell,* 41 Cal.4th at 1067. This Court first applied duplication preemption to invalidate a local law that banned opium smoking, because state law already prohibited that activity. *In re Sic*, 73 Cal. at 144, 146, 149.

6(A)(2) Field Preemption

"A local ordinance *enters a field fully occupied* by state law in either of two situations—when the Legislature 'expressly manifest[s]' its intent to occupy the legal area or when the Legislature 'impliedly' occupies the field." *O'Connell*, 41 Cal.4th at 1068. Because field preemption prevents local regulation of an entire field, it is subject to significant limitations: First, there is no field preemption where the Legislature has expressly authorized local regulation. *Inland Empire*, 56 Cal.4th at 729; *see IT Corp. v. Solano Cnty. Bd. of Supervisors*, 1 Cal.4th 81, 94 & n. 10 (1991) (collecting cases). Second, courts are reluctant to find field preemption of areas that have traditionally been regulated locally. *O'Connell*, 41 Cal.4th at 1069.

6(A)(3) Contradiction Preemption

"A local ordinance *contradicts* state law when it is inimical to or cannot be reconciled with state law." *O'Connell*, 41 Cal.4th at 1068. Courts sometimes refer to this as "direct conflict" preemption. *See Societa Per Azioni De Navigazione Italia v. City of Los Angeles*, 31 Cal.3d 446, 463 (1982); *Great W. Shows, Inc. v. Cnty. of Los Angeles*, 27 Cal.4th 853, 866 (2002). This Court has often cited its 1920 opinion in *Ex parte Daniels* as the prototype

of contradiction preemption, writing that it "f[ound] 'contradiction' where local legislation purported to fix a lower maximum speed limit for motor vehicles than that which general law fixed." *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal.4th 893, 898 (1993) (describing holding of *Ex parte Daniels*, 183 Cal. 636, 641-48 (1920)); *see*, *e.g.*, *O'Connell*, 41 Cal.4th at 1068; *Action Apartment Ass'n, Inc. v. City of Santa Monica*, 41 Cal.4th 1232, 1242-43 (2007).

California courts have long employed contradiction preemption to invalidate local laws that prohibit what a state "statute permits or authorizes." *Inland Empire*, 56 Cal.4th at 763 (Liu, J., concurring). For example, this Court invalidated a local ordinance that was "inimical to the important purposes" of a state law. *Action Apartment Ass'n*, 41 Cal.4th at 1243; *see id.* at 1244-46, 1249 (partially invalidating tenant-harassment ordinance as inimical to purpose of state-law privilege). Similarly, it has overturned local laws that "would frustrate the declared policies and purposes of" state labor law. *Int'l Bhd. of Elec. Workers v. City of Gridley*, 34 Cal.3d 191, 202 (1983); *see id.* (city resolution invalid because it "interferes with both the policies and purposes of" state law).

It has also invalidated a zoning ordinance that favored hospitals over mental-health facilities as preempted by a state law that requires cities and counties to allow psychiatric hospitals where they allow other hospitals. *City of Torrance v. Transitional Living Centers for Los Angeles, Inc.*, 30 Cal.3d 516, 525 (1982); *see also Fisher v. City of Berkeley*, 37 Cal.3d 644, 698

(1984) (Burden-shifting ordinance invalid because it "directly conflicts with Evidence Code."), *aff'd sub nom. Fisher v. City of Berkeley, Cal.*, 475 U.S. 260 (1986).[5]

Numerous opinions from the Court of Appeal have also applied this rule to uphold or invalidate ordinances as appropriate. *See, e.g., Palmer/Sixth St. Properties, L.P. v. City of Los Angeles*, 175 Cal.App.4th 1396, 1410 (2009); *First Presbyterian Church of Berkeley v. City of Berkeley*, 59 Cal.App.4th 1241, 1249 (1997); *Water Quality Ass'n v. Cnty. of Santa Barbara*, 44 Cal.App.4th 732, 738, 742 (1996); *San Bernardino Cnty. Sheriff's Ass'n v. Bd. of Supervisors*, 7 Cal.App.4th 602, 613 (1992); *Sports Comm. Dist. 3 A. Inc. v. Cnty. of San Bernardino*, 113 Cal.App.3d 155, 159 (1980) ("Direct conflicts exist when the ordinance prohibits conduct which is expressly authorized by state law."); *Agnew v. City of Culver City*, 147 Cal.App.2d 144, 150 (1956) ("direct conflict" where ordinance prohibited what state law permits). The Ninth Circuit also applies this test. *See Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 943 (9th Cir. 2002) ("[W]e will find conflict preemption under California law when a local ordinance prohibits conduct that is expressly authorized by state statute or authorizes conduct that is expressly prohibited by state general

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[5] Although *City of Gridley* and *City of Torrance* do not use the term "contradiction preemption," the opinions make it clear that there was no field (or duplication) preemption. *See City of Gridley*, 34 Cal.3d at 202; *City of Torrance*, 30 Cal.3d 516, 520.

law.") (citing *Sports Comm. Dist. 3A*, 113 Cal.App.3d at 159).

However, a separate line of cases has applied a much narrower test that first appeared in this Court's 1993 *Sherwin-Williams* opinion. The question in *Sherwin-Williams* was whether a state law designed to prevent graffiti by making it illegal to sell spray paint to minors preempted a local ordinance that attempted to do the same thing by requiring stores to display the paint out of the public's reach. *Sherwin-Williams*, 4 Cal.4th at 898-99, 901-02. Although the opinion mostly addressed field preemption, it stated that the ordinance did not contradict the state statute because it did "not prohibit what the statute commands or command what it prohibits." *Id.* at 902.

The Court did not cite any authority for this new formulation (which substituted the word "command" for the word "authorize"); to the contrary, its only discussion of the contradiction preemption standard is a citation to *Daniels* with the standard description quoted above. *See id.* at 898. Nor did it explain why it was articulating a new test when it seems clear that the ordinance would not have contradicted state law under the traditional *Daniels* test (both laws acted to make it more difficult for minors to obtain spray paint, one by making it illegal for them to buy it, the other by making it harder for them to steal it).

Nevertheless, after *Sherwin-Williams*, many opinions have adopted this narrow language as the exclusive test for contradiction preemption. *See, e.g., Inland Empire*, 56 Cal.4th at 743; *Big Creek Lumber Co. v. Cnty. of Santa Cruz*, 38 Cal.4th

1139, 1161 (2006) (upholding logging ordinance); *Great W. Shows, Inc. v. Cnty. of Los Angeles*, 27 Cal.4th 853, 866 (2002) (upholding gun law); *Garcia v. Four Points Sheraton LAX*, 188 Cal.App.4th 364, 379 (2010) (upholding ordinance regulating gratuities); *California Veterinary Med. Ass'n v. City of W. Hollywood*, 152 Cal.App.4th 536, 557 (2007) (upholding local ban on non-therapeutic animal declawing); *Harrahill v. City Of Monrovia*, 104 Cal.App.4th 761, 769 (2002); (upholding truancy ordinance); *contra id.* at 772-73 (Mosk, J., dissenting) (law preempted under *Daniels* test).

These opinions rarely, if ever, find contradiction preemption.

6(A)(4) The *Daniels* rule is the proper test for contradiction preemption.

The narrow *Sherwin-Williams* test fails to implement the constitutional text and fails to recognize the Legislature's authority to preempt local laws; it thus makes it needlessly difficult for the Legislature to create statutory rights and protections for all Californians throughout the state without taking the drastic step of preempting an entire field and therefore foreclosing local attempts to enact further protections.

First, the narrow rule fails to give full effect to the constitutional text that local laws must not be "in conflict" with state law. A local law that prohibits people from doing what state law expressly authorizes conflicts with that state law under any reasonable understanding of the term. Thus, in a related context, state laws "conflict" with federal law not only when "it is impossible to comply with both state and federal requirements" but also when state law stands as "an obstacle to the

accomplishment and execution of the full purposes and objectives of Congress." *Peatros v. Bank of Am. NT & SA*, 22 Cal.4th 147, 153, 158 (2000) (citations omitted); *see Inland Empire*, 56 Cal.4th at 763-64 (Liu, J., concurring). This second type of conflict exists where, for example, a "Federal Statute authorizes national banks to engage in activities that the State Statute expressly forbids." *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 31 (1996).

The *Sherwin-Williams* rule fails to capture this second type of conflict that exists where a local jurisdiction bans what state law authorizes. As a result, the narrow rule would allow cities and counties to pass laws to nullify protections granted by state statute. The only way that the Legislature could prevent this would be to preempt the entire field, thus precluding *any* supplemental local legislation, or by *requiring* individuals to exercise their statutory rights (for example, by requiring qualified patients to cultivate marijuana). The *Sherwin-Williams* rule thus places artificial and unjustified limits on the Legislature's power to pass statutes that preempt local laws. *See O'Connell*, 41 Cal.4th at 1076 n.4 (authority to preempt local laws "resides exclusively with the state Legislature"); *Comm. of Seven Thousand v. Superior Court*, 45 Cal.3d 491, 500-01 (1988). This may not affect the result in some cases (such as *Sherwin-Williams* and *Inland Empire*), but in many others, including the one at bar, the difference is critical. *Cf. Inland Empire*, 56 Cal.4th at 763-64 (Liu, J., concurring) ("Because state law does not clearly authorize or intend to promote the operation of medical marijuana dispensaries, I agree that the City of Riverside's

prohibition on such dispensaries is not preempted.")

This Court should therefore clarify that state law preempts local law when local law prohibits not only what a state statute demands but also what the statute permits or authorizes.

6(B) Under the proper test, the County's ban on medical-marijuana cultivation and storage is preempted by state law.

Although the local ordinances may well pass muster under the *Sherwin-Williams* rule, they are preempted under the *Daniels* test.

6(B)(1) The ordinances would have been preempted before the passage of the CUA and MMP.

As an initial matter, the local bans would have been preempted by state drug laws before the passage of the CUA and MMP, for two reasons: First, the "comprehensive nature of [state law] in defining drug crimes and specifying penalties (including forfeiture) is so thorough and detailed as to manifest the Legislature's intent to preclude local regulation" relating to marijuana and other controlled substances. *O'Connell*, 41 Cal.4th at 1071; *see id.* at 1067, 1069-72. Local jurisdictions therefore cannot enact ordinances that create civil or criminal penalties for drug-related activities or make those activities a public nuisance subject to abatement except as specifically authorized by state law. *See id.* at 1074-75; *see also id.* at 1068.

Moreover, local ordinances that duplicate state drug laws are preempted. *See Sic.*, 73 Cal. at 146.

Thus, unless the enactment of state medical-marijuana laws has changed this, the ordinances are preempted by the state's long-existing drug laws.

6(B)(2) The voters who enacted the 1996 CUA to allow access to medical marijuana did not intend to authorize local jurisdictions to prohibit personal medical-marijuana cultivation or storage.

The CUA is meant to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes." § 11362.5(b)(1)(A), (B). As discussed above, the ballot materials informed the voters they were voting to allow patients to "grow" and "possess" marijuana for medical use, with the caveat that they could not change federal law. This is in fact the only way that patients could obtain medical marijuana under the CUA, because it did not authorize dispensaries or any transfers of marijuana except between a patient and her caregiver. *See People v. Mentch*, 45 Cal.4th 274, 283-287 (2008).

The CUA's goal is thus to allow every seriously ill Californian to, either alone or with the assistance of a caregiver, personally grow a limited amount of marijuana at the patient's residence for that patient's personal use and then store that marijuana for later use. *See* § 11362.5(d); *Inland Empire*, 56 Cal.4th at 747 (CUA makes every "patient [] primarily responsible for noncommercially supplying his or her own medical marijuana" either alone or with a caregiver.). Local laws that prohibit them from doing this contradict the will of the voters.

Nor is there anything in the CUA to suggest that the voters intended to give local governments the authority to interfere with patients' ability to grow or store marijuana for personal use. That the law expressly references state rather than local law simply reflects the historical fact that when the voters enacted the CUA, there was no local regulation of marijuana and could be no such

regulation under *Sic*. The law could therefore achieve its goal of stopping the use of the police power to prohibit qualified patients from using medical marijuana simply by providing a defense to the state laws "relating to the possession" and "cultivation of marijuana." § 11362.5(d). The electorate is presumed to have understood this existing allocation of regulatory authority when it passed the CUA and, absent an express intent to change this framework, to leave it as it was. *See Bailey v. Superior Court*, 19 Cal.3d 970, 977 n.10 (1977); *see also Am. Fin. Servs. Ass'n v. City of Oakland,* 34 Cal.4th 1239, 1255, 1261 (2005) (history of exclusive state regulation weighs heavily in favor of preemption); *Big Creek Lumber Co.*, 38 Cal.4th at 1149-50; *People v. Nguyen*, 222 Cal.App.4th 1168, 1186-87 (2014) ("There is no presumption against preemption when a local ordinance regulates in an area historically dominated by state regulation.") (citations omitted).

6(B)(3) The MMP expressly authorizes qualified patients to cultivate and possess specific quantities of medical marijuana.

Under the MMP, a "qualified patient or primary caregiver may possess no more than eight ounces of dried marijuana" and "may also maintain no more than six mature or 12 immature marijuana plants." § 11362.77(a). By stating that qualified individuals "may" possess or grow the specified quantities of marijuana the statute means that these individuals "have a right, but not an obligation, to do so." *Howard Jarvis Taxpayers Ass'n. v. City of San Diego*, 120 Cal.App.4th 374, 386 (2004) (collecting authorities using "may" to indicate this); *see Ferrara v. Belanger*, 18 Cal.3d 253, 262-63 (1976) (statute stating that initiative proponents "may" file a ballot argument "establish[ed]

the[ir] right" to do so).

By stating that qualified patients "may" possess and cultivate the specified quantities of marijuana, the MMP preempts local bans under the *Daniels* rule and under past decisions that have addressed similarly worded statutes. For example, the Court of Appeal has held that Civil Code § 1954.53(a), which states that landlords "may establish the initial" rent for their properties, preempts local rent-control laws that would prevent them from doing so. *Palmer/Sixth St. Properties, L.P. v. City of Los Angeles*, 175 Cal.App.4th 1396, 1402, 1411 (2009). It has also held that a city's attempt to prohibit electroshock therapy is preempted by state laws stating that "such treatment 'may be administered'" in certain circumstances. *N. Cal. Psychiatric Soc'y v. City of Berkeley*, 178 Cal.App.3d at 103 (quoting Welfare and Institutions Code §§ 5326.7, 5326.75); *see id.* at 105-06 ("direct conflict with" state law).

Finally, this Court and the Court of Appeal have both held that a statute providing that "telephone corporations may construct lines of telegraph along and upon any public road" under certain circumstances supersedes local attempts to prohibit them from doing so. *See Cnty. of Los Angeles v. S. Cal. Tel. Co.*, 32 Cal.2d 378, 380 & n.1, 383-84 (1948) (county could not require company to obtain franchise or pay to do this); *Cnty. of Inyo v. Hess*, 53 Cal.App.415, 424-25 (1921) (Under this provision, "telephone corporations are granted the right and privilege to use the public highways over which to construct and operate lines of telephone wires, free from any grant made by

subordinate legislative bodies."); *see also Pac. Tel. & Tel. Co. v. City & Cnty. of San Francisco*, 51 Cal.2d 766, 774 (1959) (applying rule to charter city). As in these cases, by declaring that qualified patients "may" cultivate and possess certain quantities of marijuana for personal use, the Legislature has preempted local attempts to prohibit those activities.

The Court of Appeal's contrary conclusion in this case is not persuasive. As discussed above, its reasoning relies on the premise that the County ban is a regulation of land use, an area that local jurisdictions have traditionally regulated though zoning. *See* Slip Op. at 14-15, 24, 28-30. It therefore refused to find preemption without a "clear indication of preemptive intent." *Id.* at 30. But its initial premise is wrong. First, it ignores the reality that the County's ban prohibits a qualified patient from growing even a single plant in a pot in her bedroom, or storing a few grams of marijuana in her purse. This is not land-use regulation in any meaningful sense.[6]

Second the relevant question is not whether the County claims that it regulating land use. Instead, the pertinent question is whether the activity at issue has traditionally been the subject of state or local regulation, because the courts will not lightly presume that the Legislature or voters intended to "overthrow long-established" allocation of power between the state and local

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[6] Dispensary bans (the subject of *Inland Empire*) can reasonably be deemed land use regulation. Calling a ban that prohibits individuals from growing six or fewer plants in the sanctity of their own homes a "land use regulation" stretches that term past its breaking point.

governments. *Big Creek Lumber Co. v. Cnty. of Santa Cruz,* 38 Cal.4th 1139, 1149-50 (2006). Thus, when a local jurisdiction passes laws relating to an activity that has traditionally been subject to local regulation, they are presumptively valid. *See id.* But when "a local ordinance regulates in an area historically dominated by state regulation," "[t]here is no presumption against preemption." *People v. Nguyen*, 222 Cal.App. 4th 1168, 1187 (2014) (citing *Am. Fin. Servs. Ass'n v. City of Oakland,* 34 Cal.4th 1239 (2005)); *see id.* at 1187-88 (2014) (holding that ordinance banning sex offenders from parks was preempted as improper regulation of sex offenders, not of parks, which were traditionally subject to local control). To the contrary, a history of exclusive state regulation weighs heavily in favor of preemption. *See Am. Fin. Servs. Ass'n,* 34 Cal.4th at 1255, 1261.

As discussed above, California cities and counties have not traditionally exercised control over the cultivation and storage of marijuana; to the contrary, this has been an area exclusively controlled by state law. In fact, state law has long provided civil and criminal penalties for those who maintain a "building or place … for the purpose of unlawfully … storing, keeping, [or] manufacturing" illegal controlled substances, including marijuana. § 11570 (enacted in 1972). Nor is there any indication that cities and counties have traditionally regulated houseplants or small gardens, or the storage of herbs used for medical uses. The Court of Appeal's analysis in this matter is fundamentally flawed.

6(B)(4) The MMP expressly authorizes local governments to pass laws allowing patients "to exceed the state limits", and thus forbids them from imposing lower limits.

Section 11362.77(c) states that "[c]ounties and cities may retain or enact medical marijuana guidelines allowing qualified patients to exceed the state limits set forth in subdivision (a)." Nowhere does the MMP authorize local governments to impose lower limits. Thus, "the amounts set forth in [§ 11362.77(a)] were intended 'to be the threshold, not the ceiling'" of what qualified patients may possess or grow. *People v. Wright*, 40 Cal.4th 81, 97 (2006) (citing legislative history).

The Court of Appeal rightfully found that, under the maxim *expression unius est exclusion alterius,* "the express authority granted by subdivision (c) of section 11362.77 to increase allowable quantities supports the inference that the Legislature intended to prevent local governments from reducing allowable quantities and thereby expanding *criminal liability* for activities involving medical marijuana." Slip Op. at 29; *see Gikas v. Zolin,* 6 Cal.4th 841, 852 (1993) (discussing maxim). But it then refused to apply this inference to the ordinance's substantive provisions based on its premise that the ordinance regulates land use, rather than medical marijuana. *See id.* at 29-30. This is wrong not only because the premise is faulty but also because the specific authorization for cities and counties to allow patients to grow and possess greater amounts than the quantities specified in state law demonstrates that the Legislature did not intend to authorize them to enact ordinances that do the opposite. Local land use regulations are not immune from scrutiny under Art. XI

§ 7. *See Morehart v. Cnty. of Santa Barbara*, 7 Cal.4th 725, 760 (1994) (local zoning law that conflicts with "paramount concern" of state statute is "impliedly preempt[ed]"). Even if the ordinance were a land-use regulation, it would still be preempted.

7. CONCLUSION

For the reasons discussed above, this Court should grant review in this matter.

Respectfully submitted,

Dated: January 11, 2016

_____
Michael T. Risher

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CERTIFICATE OF COMPLIANCE

I certify that the text in the attached Brief contains 6584 words, as calculated by Microsoft Word, including footnotes but not the caption, the table of contents, the table of authorities, signature blocks, or this certification.

Dated: January 11, 2016

By: _____
Michael T. Risher

Attachment: 1996 Compassionate Use Act Ballot Materials
(Rule of Court 8.504(e)(1)(C))

California

BALLOT PAMPHLET

Important Notice to Voters
Information regarding measures that might be placed on the ballot by the Legislature after August 12, 1996 will be included in a supplemental ballot pamphlet that will be mailed to you. You can also obtain one from your county elections office or by calling 1-800-345-VOTE.

General Election

NOVEMBER 5, 1996

CERTIFICATE OF CORRECTNESS

I, Bill Jones, Secretary of State of the State of California, do hereby certify that the measures included herein will be submitted to the electors of the State of California at the GENERAL ELECTION to be held throughout the State on November 5, 1996, and that this pamphlet has been correctly prepared in accordance with law.

Witness my hand and the Great Seal of the State in Sacramento, California, this 12th day of August, 1996.

BILL JONES
Secretary of State

November 5, 1996, Ballot Measures—Continued

	SUMMARY	WHAT YOUR VOTE MEANS	
		YES	NO
214 **HEALTH CARE. CONSUMER PROTECTION.** Initiative Statute Put on the Ballot by Petition Signatures	Regulates health care businesses. Prohibits discouraging health care professionals from informing patients or advocating treatment. Requires health care businesses to establish criteria for payment and facility staffing. Fiscal Impact: Increased state and local government costs for existing health programs and benefits, probably in the tens to hundreds of millions of dollars annually.	A **YES** vote on this measure means: Physical examinations would be required before health plans or insurers could deny recommended care. State staffing standards would be expanded to more types of health facilities, taking the needs of individual patients into account. Health care businesses could not offer financial incentives to doctors and others to reduce care. Certain health care employees and contractors would have additional protections.	A **NO** vote on this measure means: There would be no requirements regarding physical examinations prior to denial of recommended care. There would not be any change to current state and federal laws regarding health facility staffing, health care employee and contractor protections, and restrictions on financial incentives to reduce care.
215 **MEDICAL USE OF MARIJUANA.** Initiative Statute Put on the Ballot by Petition Signatures	Exempts from criminal laws patients and defined caregivers who possess or cultivate marijuana for medical treatment recommended by a physician. Provides physicians who recommend use shall not be punished. Fiscal Impact: Probably no significant fiscal impact on state and local governments.	A **YES** vote on this measure means: Persons with certain illnesses (and their caregivers) could grow or possess marijuana for medical use when recommended by a physician. Laws prohibiting the nonmedical use of marijuana are not changed.	A **NO** vote on this measure means: Growing or possessing marijuana for any purpose (including medical purposes) would remain illegal.
216 **HEALTH CARE. CONSUMER PROTECTION. TAXES ON CORPORATE RESTRUCTURING.** Initiative Statute Put on the Ballot by Petition Signatures	Regulates health care businesses. Prohibits discouraging health care professionals from informing patients. Prohibits conditioning coverage on arbitration agreement. Establishes nonprofit consumer advocate. Imposes taxes on corporate restructuring. Fiscal Impact: New tax revenues, potentially hundreds of millions of dollars annually, to fund specified health care. Additional state and local government costs for existing health programs and benefits, probably tens to hundreds of millions of dollars annually.	A **YES** vote on this measure means: New taxes would be imposed on health care businesses to fund specified health care services. Physical examinations would be required before health plans or insurers could deny recommended care. State staffing standards would be set for all health facilities, taking the needs of individual patients into account. Health care businesses could not offer financial incentives to doctors and others to reduce care. Certain health care employees and contractors would have additional protections.	A **NO** vote on this measure means: New taxes would not be imposed on health care businesses to finance health care services. There would be no requirement regarding physical examinations prior to denial of recommended care. There would not be any change to current state and federal laws regarding health facility staffing, health care employee and contractor protections, and restrictions on financia incentives to reduce care.
217 **TOP INCOME TAX BRACKETS. REINSTATEMENT. REVENUES TO LOCAL AGENCIES.** Initiative Statute Put on the Ballot by Petition Signatures	Retroactively reinstates highest tax rates on taxpayers with taxable income over $115,000 and $230,000 (current estimates) and joint taxpayers with taxable incomes over $230,000 and $460,000 (current estimates). Allocates revenue from those rates to local agencies. Fiscal Impact: Annual increase in state personal income tax revenues of about $700 million, with about half the revenues allocated to schools and half to other local governments.	A **YES** vote on this measure means: Income taxes will be raised on the highest income taxpayers in the state, with the increased revenues going to schools and other local governments.	A **NO** vote on this measure means: Income taxes on the highest-income taxpayers in the state will not be raised.
218 **VOTER APPROVAL FOR LOCAL GOVERNMENT TAXES. LIMITATIONS ON FEES, ASSESSMENTS, AND CHARGES.** Initiative Constitutional Amendment Put on the Ballot by Petition Signatures	Requires a majority of voters to approve increases in general taxes. Requires property-related assessments, fees, charges be submitted to property owners for approval. Fiscal Impact: Short-term local government revenue losses of more than $100 million annually. Long-term local government revenue losses of potentially hundreds of millions of dollars annually. Comparable reductions in spending for local public services.	A **YES** vote on this measure means: Local governments' ability to charge assessments and certain property-related fees would be significantly restricted. Spending for local public services would be reduced accordingly. Many existing and future local government fees, assessments, and taxes would be subject to voter-approval.	A **NO** vote on this measure means: Local governments could continue to collect existing property-related fees, assessments, and taxes to pay for local public services. Local governments would have no new voter-approval requirements for revenue increases.

November 5, 1996, Ballot Measures—Continued

ARGUMENTS		WHOM TO CONTACT FOR MORE INFORMATION	
PRO	**CON**	**FOR**	**AGAINST**
Proposition 214 protects freedom of speech between patients and doctors, and patients' right to the care that their health insurance has already paid for. It prevents HMOs and insurers from using gag rules, intimidation, or financial incentives to discourage doctors from providing needed care. Please, vote yes on Proposition 214.	Proposition 214, like 216, is bogus health care reform. It increases health insurance by up to 15% (costing *billions*), costs taxpayers hundreds of millions, and helps trial lawyers file more frivolous lawsuits. 214 and 216 could cost 60,000 workers their jobs but don't provide health coverage to anyone. Vote *no*.	Californians for Patient Rights 560 Twentieth Street Oakland, CA 94612 (510) 433-9360 Internet Address: http://www.yes-prop214.org	Taxpayers Against Higher Health Costs Stop the Hidden Health Care Tax 915 L Street, Suite C240 Sacramento, CA 95814 (916) 552-7526 (800) 996-6287 Fax: (916) 552-7523 Web Site: http://www.noprop214.org
Marijuana can relieve pain and suffering in serious illnesses like cancer, glaucoma and AIDS. Proposition 215 permits patients to use marijuana, *but only if they have the approval of a licensed physician.* Tight controls limiting marijuana to patients only will remain in place. Cancer doctors and nurses groups support 215.	*Propositon 215 legalizes marijuana. Vote no.* It allows people to grow and smoke marijuana for stress or "any other illness." No written prescription or examination is required, even children can smoke pot legally. The American Cancer Society rejects smoking marijuana for medical purposes and no major doctor's organization supports 215.	Californians for Medical Rights 1250 Sixth Street, #202 Santa Monica, CA 90401 (310) 394-2952 Fax: (310) 451-7494 Internet home page: http://www.prop215.org	Citizens for a Drug-Free California Sheriff Brad Gates, Chairman 4901 Birch Street Newport Beach, CA 92660 (714) 476-3017
Protects consumers against unsafe care by insurance companies and HMOs. Outlaws bonuses to doctors for denying treatment. Restores control of patient care to doctors and nurses. Saves lives. Reduces costs to taxpayers, businesses. Bans unjustified premium increases. Creates independent watchdog. Backed by California Nurses Association, Harvey Rosenfield and Ralph Nader.	Propositions 216 and 214 are near twins—phony health care reform that costs taxpayers and consumers billions without providing coverage to the uninsured. 216 means: four new taxes; dramatically higher health insurance costs; more government bureaucrats; more frivolous lawsuits for trial lawyers; and up to 60,000 lost jobs. Vote *no*.	Harvey Rosenfield Consumers and Nurses for Patient Protection 1750 Ocean Park #200 Santa Monica, CA 90405 (310) 392-0522 E-Mail: network@primenet.com	Taxpayers Against Higher Health Costs Stop the Hidden Health Care Tax 915 L Street, Suite C240 Sacramento, CA 95814 (916) 552-7526 (800) 996-6287 Fax: (916) 552-7523 Web Site: http://www.noprop216.org
Proposition 217 restores a little fiscal sanity to California. It cancels a tax cut for the wealthiest 1.2%—a cut the rest of us won't get—to protect schools and restore local funding the state took away. Support your local schools, law enforcement, libraries, parks, and child protection. Vote *yes*.	*Taxes already are too high!* Retroactive tax increase effectively gives California highest personal income tax rate nationwide. Small businesses would be hurt. *Absolutely no guarantees or accountability how the new tax money would be spent.* Contains too many provisions with uncertain and even potentially dangerous economic consequences. *No* on 217!	Yes on Proposition 217 2500 Wilshire Blvd., Suite 508 Los Angeles, CA 90057 213-386-4036 Web site address: http://www.prop217.org	Californians for Jobs, Not More Taxes/No on 217 111 Anza Boulevard, Suite 406 Burlingame, CA 94010 (415) 340-0470
Proposition 218 simply gives taxpayers the right to vote on taxes. Proposition 218 provides only registered Californians vote on taxes. Nonresidents, foreigners, corporations get no new rights. Proposition 218 doesn't cut traditional "lifeline" services; allows taxes for police, fire, education. *Your right to vote on taxes: Yes on Proposition 218.*	Gives large landowners—including noncitizens—more voting power than average homeowners. Denies assessment voting rights for renters. Cuts *existing* funding for local police, fire, library services. Adds *new taxes* on public property like neighborhood schools, cutting funds available for teaching and classroom supplies and computers; increases *school crowding.*	The Howard Jarvis Taxpayers Association The Right to Vote on Taxes Act, Yes on Prop. 218 621 S. Westmoreland Avenue, Suite 202 Los Angeles, CA 90005 (213) 384-9656	Citizens for Voters' Rights 2646 Dupont Dr., Suite 20-412 Irvine, CA 92612 (714) 222-5438 http://www.prop218no.org

Medical Use of Marijuana. Initiative Statute.

Official Title and Summary Prepared by the Attorney General

MEDICAL USE OF MARIJUANA. INITIATIVE STATUTE.

- Exempts patients and defined caregivers who possess or cultivate marijuana for medical treatment recommended by a physician from criminal laws which otherwise prohibit possession or cultivation of marijuana.
- Provides physicians who recommend use of marijuana for medical treatment shall not be punished or denied any right or privilege.
- Declares that measure not be construed to supersede prohibitions of conduct endangering others or to condone diversion of marijuana for non-medical purposes.
- Contains severability clause.

Summary of Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact:

- Adoption of this measure would probably have no significant fiscal impact on state and local governments.

Analysis by the Legislative Analyst

BACKGROUND

Under current state law, it is a crime to grow or possess marijuana, regardless of whether the marijuana is used to ease pain or other symptoms associated with illness. Criminal penalties vary, depending on the amount of marijuana involved. It is also a crime to transport, import into the state, sell, or give away marijuana.

Licensed physicians and certain other health care providers routinely prescribe drugs for medical purposes, including relieving pain and easing symptoms accompanying illness. These drugs are dispensed by pharmacists. Both the physician and pharmacist are required to keep written records of the prescriptions.

PROPOSAL

This measure amends state law to allow persons to grow or possess marijuana for medical use when recommended by a physician. The measure provides for the use of marijuana when a physician has determined that the person's health would benefit from its use in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or "any other illness for which marijuana provides relief." The physician's recommendation may be oral or written. No prescriptions or other record-keeping is required by the measure.

The measure also allows caregivers to grow and possess marijuana for a person for whom the marijuana is recommended.

The measure states that no physician shall be punished for having recommended marijuana for medical purposes. Furthermore, the measure specifies that it is not intended to overrule any law that prohibits the use of marijuana for *nonmedical* purposes.

FISCAL EFFECT

Because the measure specifies that growing and possessing marijuana is restricted to medical uses when recommended by a physician, and does not change other legal prohibitions on marijuana, this measure would probably have no significant state or local fiscal effect.

For text of Proposition 215 see page 104

215 Medical Use of Marijuana. Initiative Statute.

Argument in Favor of Proposition 215

PROPOSITION 215 HELPS TERMINALLY ILL PATIENTS

Proposition 215 will allow seriously and terminally ill patients to legally use marijuana, if, and only if, they have the approval of a licensed physician.

We are physicians and nurses who have witnessed firsthand the medical benefits of marijuana. *Yet today in California, medical use of marijuana is illegal.* Doctors cannot prescribe marijuana, and terminally ill patients must break the law to use it.

Marijuana is not a cure, but it can help cancer patients. Most have severe reactions to the disease and chemotherapy—commonly, severe nausea and vomiting. One in three patients discontinues treatment despite a 50% chance of improvement. When standard anti-nausea drugs fail, marijuana often eases patients' nausea and permits continued treatment. It can be either smoked or baked into foods.

MARIJUANA DOESN'T JUST HELP CANCER PATIENTS

University doctors and researchers have found that marijuana is also effective in: lowering internal eye pressure associated with glaucoma, slowing the onset of blindness; reducing the pain of AIDS patients, and stimulating the appetites of those suffering malnutrition because of AIDS 'wasting syndrome'; and alleviating muscle spasticity and chronic pain due to multiple sclerosis, epilepsy, and spinal cord injuries.

When one in five Americans will have cancer, and 20 million may develop glaucoma, shouldn't our government let physicians prescribe any medicine capable of relieving suffering?

The federal government stopped supplying marijuana to patients in 1991. Now it tells patients to take Marinol, a synthetic substitute for marijuana that can cost $30,000 a year and is often less reliable and less effective.

Marijuana is not magic. But often it is the only way to get relief. A Harvard University survey found that almost one-half of cancer doctors surveyed would prescribe marijuana to some of their patients if it were legal.

IF DOCTORS CAN PRESCRIBE MORPHINE, WHY NOT MARIJUANA?

Today, physicians are allowed to prescribe powerful drugs like morphine and codeine. It doesn't make sense that they cannot prescribe marijuana, too.

Proposition 215 allows physicians to recommend marijuana in writing or verbally, but if the recommendation is verbal, the doctor can be required to verify it under oath. Proposition 215 would also protect patients from criminal penalties for marijuana, but ONLY if they have a doctor's recommendation for its use.

MARIJUANA WILL STILL BE ILLEGAL FOR NON-MEDICAL USE

Proposition 215 DOES NOT permit non-medical use of marijuana. Recreational use would still be against the law. Proposition 215 does not permit anyone to drive under the influence of marijuana.

Proposition 215 allows patients to cultivate their own marijuana simply because federal laws prevent the sale of marijuana, and a state initiative cannot overrule those laws.

Proposition 215 is based on legislation passed twice by both houses of the California Legislature with support from Democrats and Republicans. Each time, the legislation was vetoed by Governor Wilson.

Polls show that a majority of Californians support Proposition 215. Please join us to relieve suffering and protect your rights. VOTE YES ON PROPOSITION 215.

RICHARD J. COHEN, M.D.
Consulting Medical Oncologist (Cancer Specialist), California-Pacific Medical Center, San Francisco

IVAN SILVERBERG, M.D.
Medical Oncologist (Cancer Specialist), San Francisco

ANNA T. BOYCE
Registered Nurse, Orange County

Rebuttal to Argument in Favor of Proposition 215

AMERICAN CANCER SOCIETY SAYS: ". . . *Marijuana is not a substitute for appropriate anti-nausea drugs for cancer chemotherapy and vomiting. [We] see no reason to support the legalization of marijuana for medical use.*"

Thousands of scientific studies document the harmful physical and psychological effects of smoking marijuana. It is not compassionate to give sick people a drug that will make them sicker.

SMOKING MARIJUANA IS NOT APPROVED BY THE FDA FOR *ANY* ILLNESS

Morphine and codeine are FDA approved drugs. The FDA has not approved smoking marijuana as a treatment for *any* illness.

Prescriptions for easily abused drugs such as morphine and codeine must be in writing, and in triplicate, with a copy sent to the Department of Justice so these dangerous drugs can be tracked and kept off the streets. Proposition 215 requires absolutely *no* written documentation of any kind to grow or smoke marijuana. It will create legal loopholes that would protect drug dealers and growers from prosecution.

PROPOSITION 215 IS MARIJUANA LEGALIZATION—NOT MEDICINE

- Federal laws prohibit the possession *and* cultivation of marijuana. Proposition 215 would encourage people to break federal law.
- Proposition 215 will make it legal for people to smoke marijuana in the workplace . . . or in public places . . . next to your children.

NOT ONE MAJOR DOCTOR'S ORGANIZATION, LAW ENFORCEMENT ASSOCIATION OR DRUG EDUCATION GROUP SUPPORTS PROPOSITION 215—IT'S A SCAM CONCOCTED AND FINANCED BY DRUG LEGALIZATION ADVOCATES! PLEASE VOTE *NO*.

SHERIFF BRAD GATES
Past President, California State Sheriffs' Association

ERIC A. VOTH, M.D., F.A.C.P.
Chairman, The International Drug Strategy Institute

GLENN LEVANT
Executive Director, D.A.R.E. America

 Arguments printed on this page are the opinions of the authors and have not been checked for accuracy by any official agency.

Argument Against Proposition 215

READ PROPOSITION 215 CAREFULLY • IT IS A CRUEL HOAX

The proponents of this deceptive and poorly written initiative want to exploit public compassion for the sick in order to legalize and legitimatize the widespread use of marijuana in California.

Proposition 215 DOES NOT restrict the use of marijuana to AIDS, cancer, glaucoma and other serious illnesses.

READ THE FINE PRINT. Proposition 215 legalizes marijuana use for *"any other illness for which marijuana provides relief."* This could include stress, headaches, upset stomach, insomnia, a stiff neck . . . or just about anything.

NO WRITTEN PRESCRIPTION REQUIRED
• EVEN CHILDREN COULD SMOKE POT LEGALLY!

Proposition 215 does not require a written prescription. Anyone with the "oral recommendation or approval by a physician" can grow, possess or smoke marijuana. No medical examination is required.

THERE IS NO AGE RESTRICTION. Even children can be legally permitted to grow, possess and use marijuana . . . without parental consent.

NO FDA APPROVAL • NO CONSUMER PROTECTION

Consumers are protected from unsafe and impure drugs by the Food and Drug Administration (FDA). This initiative makes marijuana available to the public without FDA approval or regulation. Quality, purity and strength of the drug would be unregulated. There are no rules restricting the amount a person can smoke or how often they can smoke it.

THC, the active ingredient in marijuana, is already available by prescription as the FDA approved drug Marinol.

Responsible medical doctors wishing to treat AIDS patients, cancer patients and other sick people can prescribe Marinol right now. They don't need this initiative.

NATIONAL INSTITUTE OF HEALTH, MAJOR MEDICAL GROUPS SAY *NO* TO SMOKING MARIJUANA FOR MEDICINAL PURPOSES

The National Institute of Health conducted an extensive study on the medical use of marijuana in 1992 and concluded that smoking marijuana is *not* a safe or more effective treatment than Marinol or other FDA approved drugs for people with AIDS, cancer or glaucoma.

The American Medical Association, the American Cancer Society, the National Multiple Sclerosis Society, the American Glaucoma Society and other top medical groups have *not* accepted smoking marijuana for medical purposes.

LAW ENFORCEMENT AND DRUG PREVENTION LEADERS SAY *NO* TO PROPOSITION 215

The California State Sheriffs Association
The California District Attorneys Association
The California Police Chiefs Association
The California Narcotic Officers Association
The California Peace Officers Association
Attorney General Dan Lungren

say that Proposition 215 will provide new legal loopholes for drug dealers to avoid arrest and prosecution . . .

Californians for Drug-Free Youth
The California D.A.R.E. Officers Association
Drug Use Is Life Abuse
Community Anti-Drug Coalition of America
Drug Watch International

say that Proposition 215 will damage their efforts to convince young people to remain drug free. It sends our children the false message that marijuana is safe and healthy.

HOME GROWN POT • HAND ROLLED "JOINTS"
• DOES THIS SOUND LIKE MEDICINE?

This initiative allows unlimited quantities of marijuana to be grown anywhere . . . in backyards or near schoolyards without any regulation or restrictions. This is not responsible medicine. It is marijuana legalization.

VOTE *NO* ON PROPOSITION 215

JAMES P. FOX
President, California District Attorneys Association

MICHAEL J. MEYERS, M.D.
Medical Director, Drug and Alcohol Treatment Program, Brotman Medical Center, CA

SHARON ROSE
Red Ribbon Coordinator, Californians for Drug-Free Youth, Inc.

Rebuttal to Argument Against Proposition 215

SAN FRANCISCO DISTRICT ATTORNEY TERENCE HALLINAN SAYS . . .

Opponents aren't telling you that law enforcement officers are on both sides of Proposition 215. I support it because I don't want to send cancer patients to jail for using marijuana.

Proposition 215 does not allow "unlimited quantities of marijuana to be grown anywhere." It only allows marijuana to be grown for a patient's personal use. Police officers can still arrest anyone who grows too much, or tries to sell it.

Proposition 215 doesn't give kids the okay to use marijuana, either. Police officers can still arrest anyone for marijuana offenses. Proposition 215 simply gives those arrested a defense in court, *if they can prove they used marijuana with a doctor's approval.*

ASSEMBLYMAN JOHN VASCONCELLOS SAYS . . .

Proposition 215 is based on a bill I sponsored in the California Legislature. It passed both houses with support from both parties, but was vetoed by Governor Wilson. If it were the kind of irresponsible legislation that opponents claim it was, it would not have received such widespread support.

CANCER SURVIVOR JAMES CANTER SAYS . . .

Doctors and patients should decide what medicines are best. Ten years ago, I nearly died from testicular cancer that spread into my lungs. Chemotherapy made me sick and nauseous. The standard drugs, like Marinol, didn't help.

Marijuana blocked the nausea. As a result, I was able to continue the chemotherapy treatments. Today I've beaten the cancer, and no longer smoke marijuana. I credit marijuana as part of the treatment that saved my life.

TERENCE HALLINAN
San Francisco District Attorney

JOHN VASCONCELLOS
Assemblyman, 22nd District
Author, 1995 Medical Marijuana Bill

JAMES CANTER
Cancer survivor, Santa Rosa

asserting as a defense or otherwise relying on any of the antitrust law exemptions contained in Section 16770 of the Business and Professions Code, Section 1342.6 of the Health and Safety Code, or Section 10133.6 of the Insurance Code, in any civil or criminal action against it for restraint of trade, unfair trading practices, unfair competition or other violations of Part 2 (commencing with Section 16600) of Division 7 of the Business and Professions Code.

(d) The remedies contained in this chapter are in addition and cumulative to any other remedies provided by statute or common law.

Article 14. Severability

1399.960. (a) If any provision, sentence, phrase, word, or group of words in this chapter, or their application to any person or circumstance, is held to be invalid, that invalidity shall not affect other provisions, sentences, phrases, words, groups of words or applications of this chapter. To this end, the provisions, sentences, phrases, words and groups of words in this chapter are severable.

(b) Whenever a provision, sentence, phrase, word, or group of words is held to be in conflict with federal law, that provision, sentence, phrase, word, or group of words shall remain in full force and effect to the maximum extent permitted by federal law.

Article 15. Amendment

1399.965. (a) This chapter may be amended only by the Legislature in ways that further its purposes. Any other change in the provisions of this chapter shall be approved by vote of the people. In any judicial proceeding concerning a legislative amendment to this chapter, the court shall exercise its independent judgment as to whether or not the amendment satisfies the requirements of this chapter.

(b) No amendment shall be deemed to further the purposes of this chapter unless it furthers the purpose of the specific provision of this chapter that is being amended.

Article 16. Definitions

1399.970. The following definitions shall apply to this chapter:

(a) "Affiliated enterprise" means any entity of any form that is wholly owned, controlled, or managed by a health care business, or in which a health care business holds a beneficial interest of at least twenty-five percent (25%) either through ownership of shares or control of memberships.

(b) "Available for public inspection" means available at the facility or agency during regular business hours to any person for inspection or copying, or both, with any charges for the copying limited to the reasonable cost of reproduction and, when applicable, postage.

(c) "Caregiver" or "licensed or certified caregiver" means health personnel licensed or certified under Division 2 (commencing with Section 500) of the Business and Professions Code, including a person licensed under any initiative act referred to therein, health personnel regulated by the State Department of Health Services, and health personnel regulated by the Emergency Medical Services Authority.

(d) "Health care business" means any health facility, organization, or institution of any kind that provides, or arranges for the provision of, health services, regardless of business form and whether or not organized and operating as a profit or nonprofit, tax-exempt enterprise, including all of the following:

(1) Any health facility defined herein.

(2) Any health care service plan as defined in subdivision (f) of Section 1345 of the He and Safety Code.

(3) Any nonprofit hospital service plan as governed by Chapter 11a (commencing with Section 11491) of Part 2 of Division 2 of the Insurance Code.

(4) Any disability insurer providing hospital, medical, or surgical coverage as governed by Section 11012.5 and following of the Insurance Code.

(5) Any provider of emergency ambulance services, limited advanced life support, or advanced life support services.

(6) Any preferred provider organization, independent practice association, or other organized group of health professionals with 50 or more employees in the aggregate contracting for the provision or arrangement of health services.

(e) "Health care consumer" or "patient" means any person who is an actual or potential recipient of health services.

(f) "Health care services" or "health services" means health services of any kind, including, but not limited to, diagnostic tests or procedures, medical treatments, nursing care, mental health, and other health care services as defined in subdivision (b) of Section 1345 of the Health and Safety Code.

(g) "Health facility" means any licensed facility of any kind at which health services are provided, including, but not limited to, those facilities defined in Sections 1250, 1200, 1200.1, and 1204, and home health agencies, as defined in Section 1374.10, regardless of business form, and whether or not organized and operating as a profit or nonprofit, tax-exempt or non-exempt enterprise, and including facilities owned, operated, or controlled, by governmental entities, hospital districts, or other public entities.

(h) "Private health care business" means any health care business as defined herein except governmental entities, including hospital districts and other public entities. "Private health care business" shall include any joint venture, partnership, or any other arrangement or enterprise involving a private entity or person in combination or alliance with a public entity.

(i) "Health insurer" means any of the following:

(1) Any health care service plan as defined in subdivision (f) of Section 1345 of the Health and Safety Code.

(2) Any nonprofit hospital service plan as governed by Chapter 11a (commencing with Section 11491) of Part 2 of Division 2 of the Insurance Code.

(3) Any disability insurer providing hospital, medical, or surgical coverage as governed by Section 11012.5 and following of the Insurance Code.

Proposition 215: Text of Proposed Law

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8 of the Constitution.

This initiative measure adds a section to the Health and Safety Code; therefore, new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

SECTION 1. Section 11362.5 is added to the Health and Safety Code, to read:

11362.5. (a) This section shall be known and may be cited as the Compassionate Use Act of 1996.

(b)(1) The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows:

(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.

(B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.

(C) To encourage the federal and state governments to implement a plan to provide for . safe and affordable distribution of marijuana to all patients in medical need of marijuana.

(2) Nothing 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.

(c) Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.

(d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

(e) For the purposes of this section, "primary caregiver" means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person.

SEC. 2. If any provision of this measure or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of the measure that can be given effect without the invalid provision or application, and to this end the provisions of this measure are severable.

Proposition 216: Text of Proposed Law

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8 of the Constitution.

This initiative measure adds sections to the Health and Safety Code; therefore, new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

Division 2.4 (commencing with Section 1796.01) is added to the Health and Safety Code to read:

Division 2.4. The Patient Protection Act

Chapter 1. Purpose and Intent

1796.01. This division shall be known as the "Patient Protection Act." The people of California find and declare all of the following:

(a) No health maintenance organization (HMO) or other health care business should be able to prevent doctors, registered nurses, and other health care professionals from informing patients of any information that is relevant to their health care.

(b) Doctors, registered nurses, and other health care professionals should be able to advocate for patients without fear of retaliation from HMOs and other health care businesses.

(c) Health care businesses should not create conflicts of interest that force doctors to choose between increasing their pay or giving their patients medically appropriate care.

(d) Patients should not be denied the medical care their doctor recommends just because their HMO or health insurer thinks it will cost too much.

(e) HMOs and other health insurers should establish publicly available criteria for authorizing or denying care that are determined by appropriately qualified health professionals.

(f) No HMO or other health insurer should be able to deny a treatment recommended by a patient's physician unless the decision to deny is made by an appropriately qualified health professional who has physically examined the patient.

(g) All doctors and health care professionals who are responsible for determining in any way the medical care that a health plan provides to patients should be subject to the same professional standards and disciplinary procedures as similarly licensed health professionals who provide direct care for patients.

(h) No hospital, nursing home, or other health facility should be allowed to operate unless it maintains minimum levels of safe staffing by doctors, registered nurses, and other health professionals.

(i) The quality of health care available to California consumers will suffer if health becomes a big business that cares more about making money than it cares about taking g care of patients.

(j) It is not fair to consumers when health care executives are paid millions of dollars in salaries and bonuses while consumers are being forced to accept more and more restrictions on their health care coverage.

(k) The premiums paid to health insurers should be spent on health care services for

Attachment: Court of Appeal Opinion

Filed 12/1/15

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

DIANA KIRBY, Plaintiff and Appellant, v. COUNTY OF FRESNO et al. Defendants and Respondents.	F070056 (Super. Ct. No. 14CECG00551) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Fred Dupras, Judge. (Retired judge of the Fresno Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

Henry G. Wykowski & Associates, Henry G. Wykowski, Christopher J. Wood and Andrew Scher for Plaintiff and Appellant.

Best Best & Krieger, Jeffrey V. Dunn and Seena Samimi for Defendants and Respondents.

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The County of Fresno (County) adopted an ordinance that banned marijuana dispensaries, cultivation and storage of medical marijuana in all its zoning districts. It classified violations of the ordinance as both public nuisances and misdemeanors. It also

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part V.

limited the use of medical marijuana to qualified medical marijuana patients at their personal residences only.

Plaintiff Diana Kirby sued to invalidate the ordinance. She alleged the ordinance created an unconstitutional conflict with the right to cultivate, possess and use medical marijuana provided by the Compassionate Use Act (CUA) (Health & Saf. Code, § 11362.5)[1] and the Medical Marijuana Program (MMP) (§ 11362.7 et seq.) and, more specifically, deprived her of the right to cultivate medical marijuana at her residence for her personal use. Kirby also alleged the ordinance's criminalization of cultivation and storage conflicted with subdivision (e) of section 11362.71, which expressly states that certain persons shall not be "subject to arrest for possession … or cultivation of medical marijuana in an amount established pursuant to [the MMP]."

County demurred, arguing Kirby had failed to state a cause of action because its ordinance did not conflict with the narrowly drawn statutes. The trial court agreed and sustained the demurrer without leave to amend. Kirby appealed, contending her pleading identified three ways the ordinance conflicted with state law, each of which was sufficient to state a cause of action on the legal theory that all or part of the ordinance was preempted by state law. Kirby also contends the trial court abused its discretion in denying her leave to amend.

We conclude the ban on cultivation adopted under the County's authority to regulate land use does not conflict with the CUA or the MMP, which do not *expressly* restrict local government's authority over land use. As to *implicit* restrictions, we recognize the statutory provisions contain some ambiguities, but applicable legal principles require a clear indication of the Legislature's intent to restrict local government's inherent power to regulate land use. The ambiguous provisions fail to

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1 All unlabeled statutory references are to the Health and Safety Code.

provide that clear indication. We therefore uphold the County's ban on marijuana dispensaries, cultivation and storage of medical marijuana.

In contrast, we conclude that the provision in the ordinance that classifies the cultivation of medical marijuana as a misdemeanor is preempted by California's extensive statutory scheme addressing crimes, defenses and immunities relating to marijuana. Among other things, the attempt to criminalize possession and cultivation is not consistent with the *obligation* section 11362.71, subdivision (e) imposes on local officials not to arrest certain persons possessing or cultivating marijuana. Therefore, Kirby has stated a narrow cause of action challenging the validity of the criminalization provision.

We therefore reverse the judgment of dismissal.

FACTS, BACKGROUND AND PROCEEDINGS

Appellants

Kirby lives in an unincorporated area of Fresno County. She has a physician's recommendation for the medical use of marijuana and alleges she is a "qualified patient" as defined by section 11362.7, subdivision (f).[2] Kirby was in a serious accident in 1972 and lost her left leg, broke her back in three places, shattered her face and lost sight in her left eye. She is allergic to pain medications and her chronic pain is treatable only with cannabis as recommended by her physician.

[2] For purposes of the MMP, a "qualified patient" is someone "entitled to the protections of [the CUA], but who does not have an identification card issued pursuant to [the MMP]." (§ 11362.7, subd. (f).) In contrast, the MMP defines an individual who is entitled to the protections of the CUA *and* has received a valid identification card pursuant to the MMP as a "[p]erson with an identification card." (§ 11362.7, subd. (c).) Consequently, Kirby's allegation that she is a "qualified patient" can be interpreted as implying that she has not been issued an identification card.

Prior to the adoption of County's ordinance, Kirby relied on the provisions of section 11362.77 to cultivate within her personal residence six or fewer marijuana plants for personal medicinal use.

Case Law Developments

Two appellate decisions are important historically because they were decided before County adopted its ordinance and most likely relied upon by County in drafting its ordinance.

In May 2013, the California Supreme Court considered the validity of a city zoning ordinance that banned dispensaries that cultivate and distribute medical marijuana and declared them to be a public nuisance. (*City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013) 56 Cal.4th 729 (*Inland Empire*).) In that case, the city filed a complaint against a dispensary and sought injunctive relief to abate the public nuisance. (*Id*. at pp. 740-741.) The trial court granted a preliminary injunction, which was affirmed by the Court of Appeal and the Supreme Court. (*Id*. at p. 742.) The court concluded that the CUA and MMP did not preempt the city's ban on marijuana dispensaries, which was a valid exercise of the local jurisdiction's inherent authority to regulate land use. (*Id*. at pp. 738, 744.)

In November 2013, the Third Appellate District considered whether the land use authority that allowed Riverside to ban dispensaries also allowed a city to ban the cultivation of medical marijuana. The ordinance in question stated medical marijuana cultivation by any person was "'prohibited in all zone districts within the City of Live Oak.'" (*Maral v. City of Live Oak* (2013) 221 Cal.App.4th 975, 979 (*Maral*).) The plaintiffs in *Maral* challenged the ordinance, alleging it violated the CUA, the MMP, and their constitutional rights to equal protection and due process. (*Id*. at pp. 979-980.) The trial court sustained the city's demurrer and dismissed the plaintiffs' second amended complaint without leave to amend. (*Id*. at p. 980.) The Third Appellate District affirmed the dismissal. (*Id*. at p. 985.) The court (1) stated the right to cultivate marijuana was the

basis for each of the plaintiffs' causes of action and (2) concluded no such right existed. (*Id*. at p. 984.) The court relied on *Inland Empire* and *Browne v. County of Tehama* (2013) 213 Cal.App.4th 704 (*Browne*), a case that upheld a county ordinance that restricted (but did not ban) the cultivation of medical marijuana.[3]

County Ordinance

In January 2014—less than two months after the *Maral* decision—County's board of supervisors considered and unanimously adopted Ordinance No. 14-001 and amended the Fresno County Code (FCC).[4] The stated purpose and intent of Ordinance No. 14-001 was "to prohibit cultivation of medical marijuana in order to preserve the public peace, health, safety and general welfare of the citizens of Fresno County." (FCC, § 10.60.010.) The medical marijuana provisions of the ordinance took effect in early February 2014.

Sections 10.60.050 and 10.60.060 of the FCC prohibit medical marijuana dispensaries and cultivation "in all zone districts in the County." "Cultivation" is defined as "the planting, growing, harvesting, drying, processing, or storage of one or more marijuana plants or any part thereof in any location." (FCC, § 10.60.030(D).)

Violations of the FCC's ban on the cultivation and storage of medical marijuana "is declared to be a public nuisance and each person or responsible party is subject to abatement proceedings under Chapter 10.62." (FCC, § 10.60.070.) Under the abatement provisions, a public official with information that such a public nuisance "exists upon

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3 Shortly after the Third Appellate District decided *Browne*, this court filed its opinion in *County of Tulare v. Nunes* (2013) 215 Cal.App.4th 1188 (*Nunes*), which concluded a county ordinance restricting the location of medical marijuana collectives and cooperatives to commercial and manufacturing zones did not conflict with state law.

4 Ordinance No. 14-001 was not the first enactment by County to address medical marijuana. "In September 2010, the Fresno County Board of Supervisors, citing recent violence, passed an emergency initiative to ban the outdoor cultivation of medical marijuana." (Starr, *The Carrot and the Stick: Tailoring California's Unlawful Marijuana Cultivation Statute to Address California's Problems* (2013) 44 McGeorge L.Rev. 1069, 1087 (*Starr*).)

private property in the unincorporated area of the County, shall make a reasonable investigation of the facts and if possible inspect the property to determine whether or not a public nuisance exists." (FCC, § 10.62.030.) "Inspections may include photographing the conditions or obtaining samples or other physical evidence. If an owner, occupant or agent refuses permission to enter or inspect, the public official may seek an inspection warrant pursuant to the procedures provided for in the California Code of Civil Procedure Section 1822.50 through Section 1822.59." (*Ibid*.)

If a public official reasonably determines that a public nuisance involving medical marijuana exists, the official shall give written notice to the property owner, either by mail or by posting the notice on the property. (FCC, § 10.62.040(A).) The notice shall describe the public nuisance and the work required to abate the nuisance. (FCC, § 10.62.040(B).) The notice shall order the nuisance be abated within a reasonable time as determined by the official, which normally will be 15 days from the mailing of the notice. (FCC, § 10.62.040(C).)

The administrative penalty for violations is $1,000 per plant plus $100 per plant for each day that the plant remains unabated past the deadline set in the written notice ordering abatement. (FCC, § 10.64.040(A).) In addition, persons who violate the FCC's prohibitions relating to medical marijuana "shall be guilty of a misdemeanor and subject to the penalties set forth in Chapter 1.12, as well as the administrative penalties as set forth in Chapter 10.64." (FCC, § 10.60.080(A).)

If County brings a civil action to enforce the medical marijuana provisions in the FCC, "the person responsible for such violation shall be liable to the County for costs of the suit, including, but not limited to, attorney's fees." (FCC, § 10.60.080(C).)

The ordinance also contains a savings or severability provision, which states that if any part of County's medical marijuana ordinance is held to be invalid, unlawful, or unconstitutional, it shall not affect the validity of any other part of the ordinance. (FCC, § 10.60.090.)

Kirby Lawsuit

In February 2014, after the FCC medical marijuana provisions became effective, Kirby filed a verified petition for writ of mandate and complaint for injunction and declaratory relief against the County, seeking to invalidate the ordinance. County demurred, contending (1) Kirby had no constitutional or statutory right to cultivate marijuana at her personal place of residence and (2) the medical marijuana provisions in the FCC were not preempted by state law.

In June 2014, a hearing was held on the demurrer. The trial court took the matter under advisement and subsequently issued a June 13, 2014, minute order sustaining the demurrer without leave to amend. The written order did not set forth the court's rationale for sustaining the demurrer or for denying leave to amend.

Kirby timely appealed the dismissal of her action.

DISCUSSION

I. BASIC PRINCIPLES

A. Standard of Review for Demurrers

Appellate courts independently review the ruling on a general demurrer and make a de novo determination of whether the pleading "alleges facts sufficient to state a cause of action under any legal theory." (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.)

Generally, appellate courts "give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]" (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865 (*Dinuba*).) The demurrer is treated as admitting all material facts properly pleaded, but does not admit the truth of contentions, deductions or conclusions of law. (*Ibid.*; see Code Civ. Proc., § 452 [pleading "must be liberally construed, with a view to substantial justice between the parties"].)

B. Overview of California's Medical Marijuana Statutes

1. Compassionate Use Act

In 1996, California's voters approved Proposition 215, which became codified in section 11362.5 and known as the CUA. The operative provision of the CUA created a limited defense for patients and the patients' primary caregivers to the crimes for the simple possession or cultivation of marijuana:

> "Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." (§ 11362.5, subd. (d).)

The stated purposes of the CUA are: "(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use has been deemed appropriate and has been recommended by a physician …"; "(B) [t]o ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction"; and "(C) [t]o encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana." (§ 11362.5, subd. (b)(1).)

2. Medical Marijuana Program

In 2003, the Legislature enacted the MMP to (1) clarify the scope of the CUA, (2) facilitate prompt identification of qualified patients and their designated caregivers to avoid unnecessary arrests and prosecutions, (3) provide guidance to law enforcement officers, (4) "[p]romote uniform and consistent application of the [CUA] among the counties within the state,"[5] and (5) "[e]nhance the access of patients and caregivers to

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[5] This declaration of purpose was limited to *the application of the CUA*. This limitation undercuts the inference that the Legislature intended to promote consistency among all laws, including local land use regulations, addressing medical marijuana. The limited scope of the Legislature's purpose is reinforced by the idea that the field (i.e., area

medical marijuana through collective, cooperative cultivation projects."[6] (Stats. 2003, ch. 875, § 1(b)(1)-(3).)

The MMP added "18 new code sections that address the general subject matter covered by the CUA." (*People v. Kelly* (2010) 47 Cal.4th 1008, 1014 (*Kelly*).) The MMP provides for the issuance of identification cards to qualified patients (§§ 11362.71-11362.755) and provides a safe harbor for qualified patients as to the amount of marijuana they may possess and the number of plants they may maintain (§ 11362.77). Persons with valid identification cards receive certain protections under the MMP from both arrest and criminal liability.

In particular, the MMP states that persons with an identification card who transport or possess marijuana for their personal use "shall not be subject, on that sole basis, to criminal liability" under sections 11357 (possession), 11358 (cultivation), 11359 (possession for sale), 11366 (maintaining location for selling, giving away or using controlled substances), 11366.5 (managing location for manufacture or storage of controlled substance), or 11570 (drug den abatement law). (§ 11362.765, subd. (a).)

The MMP also provides collective or cooperative cultivation of marijuana with a similar defense to criminal liability under the same sections. (§ 11362.775.) As a result, the MMP "expanded the scope of protection beyond that initially provided by the CUA,

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of law) of crimes and penalties is separate from the field of land use regulation. In short, expressing a purpose of promoting consistent application *of the CUA*, a narrow statute operating in the field of criminal law, is quite different from stating a purpose to promote consistency among local land use regulations addressing medical marijuana. (See generally, *Inland Empire, supra*, 56 Cal.4th 729.)

6 Over 20 other states have legalized some form of retail distribution of marijuana, but those states have adopted different rules on whether local communities may ban retail distribution. (Mikos, *Marijuana Localism* (2015) 65 Case W. Res. L.Rev. 719, 764.) Five states have expressly authorized local bans on retail shops (*ibid.* [Alaska, Colorado, Montana, Nevada and Vermont], while three states explicitly denied local governments that power (*id.* at p. 765 [Arizona, Delaware & Oregon]).

which was limited to cultivation of and possession of medical marijuana." (*People v. Baniani* (2014) 229 Cal.App.4th 45, 55.)

As to the protection against arrest, subdivision (e) of section 11362.71 states that no person "in possession of a valid identification card shall be subject to arrest for possession, transportation, delivery, or cultivation of medical marijuana in an amount established pursuant to [the MMP]," unless there is reasonable cause to believe the card is fraudulent.

As a potential source of a right to cultivate and possess medical marijuana, Kirby refers to provisions in section 11362.77 stating that a qualified person "may possess" specified quantities of marijuana and "may also maintain" a certain number of plants. (§ 11362.77, subds. (a), (f).) Section 11362.77, subdivision (c) also authorizes counties and cities to adopt local guidelines that exceed the state limits, but says nothing about reducing those limits. The relevant provisions of section 11362.77 are quoted and discussed in part III.C, *post*.

Section 11362.83 addresses the MMP's scope and relationship with local ordinances. Its provisions are quoted and discussed in part I.C.3, *post*.

C. State Preemption

The California Constitution states that "[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.) The police power of local government is broad and "preemption by state law is not lightly presumed." (*Inland Empire*, *supra*, 56 Cal.4th at p. 738.)

Under the constitution, a local ordinance "in conflict with" a state statute is void. (*Inland Empire*, *supra*, 56 Cal.4th at p. 743.) For purposes of California preemption doctrine, a "conflict" exists if the local ordinance (1) duplicates the state statute, (2) contradicts the statute, or (3) enters an area fully occupied by general law. (*Ibid.*) The

latter category requires an examination of the Legislature's intent to fully occupy an area, which may be either expressed or implied. (*Ibid*.)

1. Duplication

Local ordinances are said to be duplicative of general law when they are "coextensive" with the state statute. (*Inland Empire, supra*, 56 Cal.4th at p. 743.) For example, in *In re Portnoy* (1942) 21 Cal.2d 237, the court determined a county ordinance declaring it unlawful to own or possess any slot machine involving chance was invalid as duplicating a section of the Penal Code. (*Id*. at p. 239-242; see *In re Mingo* (1923) 190 Cal. 769, 772-774 [county ordinance punishing possession of intoxicating liquor, an act already punished under state law, was void]; *In re Sic* (1887) 73 Cal. 142 [local law making it unlawful for persons to assemble for the purpose of smoking opium duplicative of state statute making it a crime to visit any place for the purpose of smoking opium].)

In *Inland Empire*, the court determined there was no duplication between state law and the city's ordinance banning dispensaries as the two schemes were not coextensive: "The CUA and the MMP 'decriminalize,' for state purposes, specified activities pertaining to medical marijuana, and also provide that the *state's* antidrug nuisance statute cannot be used to abate or enjoin these activities. On the other hand, the Riverside ordinance finds, for local purposes, that the use of property for certain of those activities *does* constitute a *local* nuisance." (*Inland Empire, supra*, 56 Cal.4th at p. 754.) In short, state laws relating to crime and ordinances regulating land use address separate matters and, thus, do not duplicate one another.

2. Contradiction

Conflict of the contradictory type exists for purposes of preemption when the local ordinance is "inimical" to the state statute, which means the local "ordinance directly requires what the state statute forbids or prohibits what the state enactment demands. [Citations.]" (*Inland Empire, supra*, 56 Cal.4th at p. 743.) Under this test, no preemption

exists "where it is reasonably possible to comply with both the state and local laws." (*Ibid*.) Conversely, an inimical contradiction exists where "it is impossible simultaneously to comply with both" the state and local laws. (*Id*. at pp. 754-755.)

The impossibility-of-simultaneous-compliance test used in *Inland Empire* appears to be more difficult to meet than the test used previously. For example, in *Ex Parte Daniels* (1920) 183 Cal. 636, a local ordinance that set the maximum speed limit for vehicle below that set by state law was determined to be "in direct conflict with the state law and, therefore, void." (*Id*. at p. 648.) In *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893 at page 898, the Supreme Court cited *Ex Parte Daniels* as a case where local legislation was "contradictory" to general law.[7]

In the present case, we conclude the impossibility-of-simultaneous-compliance test used in *Inland Empire* applies to determine whether a conflict of the contradictory type exists. (But see *Inland Empire*, *supra*, 56 Cal.4th at pp. 763-765 (conc. opn. of Liu, J.) [contradictory type of state preemption can occur even if it is possible for a private party to comply with both state and local law by refraining from activity].)

3. Area Fully Occupied—Intent of Legislature

The third type of state preemption exists when the local legislation enters an area fully occupied by state law. Whether an area is fully occupied is a matter of legislative intent, which can be expressed or implied. (*Inland Empire*, *supra*, 56 Cal.4th at p. 743.)

An expressed intent to fully occupy an area is determined by the plain language of the statute. (*Inland Empire*, *supra*, 56 Cal.4th at p. 753.) As relevant in this appeal,

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[7] One commentator has suggested the California Supreme Court adopted the impossibility-of-simultaneous-compliance test for purposes of state preemption doctrine to avoid "the potential for implied federal conflict preemption." (*Dual Sovereignty—Preemption—California Supreme Court Upholds Local Zoning Ban on Medical Marijuana Dispensaries—[Inland Empire]* (2014) 127 Harv. L.Rev. 1204, 1209.) By interpreting state law as it did, "the California Supreme Court may have shielded state legalization efforts from federal scrutiny for the time being." (*Id*. at p. 1211.)

implied intent may be manifested where (1) the subject matter has been so fully and completely covered by general law as to indicate clearly that it has become exclusively a matter of state concern or (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action. (*Id.* at p. 743.)

In the present case, our examination of the Legislature's intent is aided by the provision in the MMP addressing the scope of the MMP and its relationship to local ordinances. The 2003 version of section 11362.83 stated: "Nothing in this article shall prevent a city or other local governing body from adopting and enforcing laws *consistent with* [the MMP]." (Stats. 2003, ch. 875, § 2, italics added.) This expression of intent was expanded in 2011, when section 11362.83 was amended 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). [¶] (c) Enacting other laws consistent with [the MMP]." (Stats. 2011, ch. 196, § 1.)

Two aspects of section 11362.83 are worth noting. First, the current version explicitly authorizes local governments to "regulate"[8] medical marijuana cooperatives and collectives, yet does not mention the regulation of *personal* possession or cultivation. Second, section 11362.83, subdivision (c) authorizes local government to enact other laws "consistent with" the MMP, which is different from the constitutional phrase "not in conflict with." (Cal. Const., art. XI, § 7.) The meaning and application of subdivision (c) of section 11362.83 was not discussed by the Supreme Court in *Inland Empire* or by the Third Appellate District in *Maral*. Consequently, those cases establish no precedent for

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[8] The California Supreme Court has interpreted "regulate" to include the authority to ban such facilities. (*Inland Empire, supra*, 56 Cal.4th at p. 760.)

how that subdivision should be applied in this case. (See *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 680 [opinions must be understood in accordance with the facts and issues before the court; they are not authority for propositions not considered or analyzed by the court].)

4. Occupation of the Areas of Land Use, Crimes and Medical Practices

The concept of an "area fully occupied by state statute" requires us to consider more than the text of the relevant statutes, because not all areas of law are treated the same under California's preemption doctrine. For purposes of the present case, three areas of law are relevant—(1) land use regulation, (2) crimes involving controlled substances, and (3) medical practices.

Land use regulation in California historically has been regarded as a function of local government. (*Inland Empire*, *supra*, 56 Cal.4th at p. 742.) Consequently, courts presume, absent a clear indication of preemptive intent from the Legislature, that local land use regulations are *not* preempted by state statute. (*Id*. at p. 743.)

In contrast, the definition of crimes and penalties involving controlled substances is an area of law traditionally addressed at the state level. Thus, the presumption against preemption that applies to local land use regulations does not apply in the area of criminal law. For example, the California Uniform Controlled Substances Act (UCSA) (§ 11000 et seq.)[9] is regarded as so comprehensive, thorough and detailed in defining drug crimes and specifying penalties as to manifest the Legislature's intent to preclude local regulation of such crimes and penalties. (*O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1071 (*O'Connell*) [local ordinance for the forfeiture of vehicles was preempted by the UCSA].)

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9 The UCSA consists of sections 11000 through 11651 and, therefore, includes the provisions defining crimes involving marijuana and the decriminalization provisions of the CUA (§ 11362.5) and the MMP (§§ 11362.7-11362.9).

As to medical practices, that area of law (like the definition of crimes and related penalties) historically has been addressed under the state police power. (*Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 757 (*Anaheim*).) Consequently, local regulation of medical practices do not have the benefit of a presumption similar to the presumption that protects local land use regulations.

II. CRIMINALIZATION

Section 10.60.080(A) of the FCC sets forth the penalties for violating the medical marijuana ordinance by providing that violators "shall be guilty of a misdemeanor and subject to the penalties as set forth in Chapter 1.12 …." It also provides that violators are subject to administrative penalties and other enforcement remedies. (FCC, § 10.60.080(A).)

A. Contentions

Kirby contends the criminalization provision in the ordinance conflicts with California law because it subjects persons to arrest and criminal prosecution for cultivating and storing medical marijuana even if they hold a valid patient identification card. In particular, Kirby refers to subdivision (e) of section 11362.71, which states that no person "in possession of a valid identification card shall be subject to arrest for possession, transportation, delivery, or cultivation of medical marijuana in an amount established pursuant to [the MMP]," unless there is reasonable cause to believe the card is fraudulent. Kirby argues this statute preempts the ordinance provision criminalizing cultivation and storage.

County contends that the CUA and the MMP provide a limited immunity from prosecution under state statutes, but provide no immunity from prosecution pursuant to a local law such as County's. County contends that "the California Supreme Court has held that the CUA and the MMP do not foreclose the arrest of qualified patients for offenses such as possession and cultivation of marijuana" and cites *People v. Mower*

(2002) 28 Cal.4th 457 (*Mower*) as support. County argues that this court should not expand the CUA and MMP to provide additional immunities.

Kirby's reply brief argues that County (1) has not addressed the unambiguous text of subdivision (e) of section 11362.71 and its prohibition against arrests and (2) has misconstrued the holding of *Mower*, which was decided *before* the MMP was passed by the Legislature.

B. The MMP's Prohibition of Arrests

1. Mower and the MMP

In *Mower*, the California Supreme Court determined the CUA does not provide complete immunity from arrest and prosecution; instead, it provided a limited immunity that allows a defendant to raise his or her status as a qualified patient or primary caregiver as a defense at trial or in a motion to set aside an indictment or information prior to trial. (*Mower*, *supra*, 28 Cal.4th at p. 464.) In reaching this conclusion, the court stated that immunity *from arrest* is exceptional and ordinarily does not exist without an express grant from the Legislature. (*Id*. at p. 469.) The court filed its decision in *Mower* in July 2002, well before the Legislature passed the MMP in 2003. (See Stats. 2003, ch. 875, §§ 1-3.)

We agree with Kirby as to the scope of the opinion filed in *Mower*. It addressed only the CUA and said nothing about the MMP. Accordingly, we reject County's position that *Mower* holds the MMP does not foreclose the arrest of qualified patients for possessing and cultivating medical marijuana.

2. Supreme Court's View of the MMP's Prohibition of Arrests

The MMP's prohibition of certain arrests was discussed by the California Supreme Court in *Inland Empire*, *supra*, 56 Cal.4th at page 754, footnote 7. Although the court's discussion of the prohibition was dicta, we regard it as persuasive. (See *Hubbard v.*

Superior Court (1997) 66 Cal.App.4th 1163, 1169 [dicta from Supreme Court is considered persuasive and generally should be followed].)

The Supreme Court's statements about the prohibition of arrests were part of its discussion of express preemption and were made to illustrate the narrow scope of the MMP. The court stated the MMP "imposes only two obligations on local governments." (*Inland Empire*, *supra*, 56 Cal.4th at p. 754, fn. 7.) One of these obligations "prohibits a local law enforcement agency or officer from refusing to accept an identification card as protection against *arrest* for the possession, transportation, delivery, or cultivation of specified amounts of medical marijuana, except upon 'reasonable cause to believe that the information contained in the card is false or fraudulent, or the card is being used fraudulently.' (§ 11362.78; see § 11362.71, subd. (e).)" (*Inland Empire*, *supra*, at p. 754, fn. 7.) The Supreme Court's clearly expressed position is exactly the opposite of County's view that the Supreme Court has determined the MMP does *not* foreclose the arrest of certain persons possessing or cultivating marijuana.

For purposes of determining whether the MMP's protection against arrest preempts the criminalization provision in FCC section 10.60.080(A), we adopt the Supreme Court's interpretation of subdivision (e) of section 11362.71 and treat that provision as imposing an *obligation* on local law enforcement agencies and officials.

3. Prohibition of Arrest Preempts Local Criminalization

The MMP's protection against "arrest" presents the following question of statutory interpretation. Does the prohibition of arrests also prohibit *prosecutions* under local ordinances? We conclude it does.

When enacting the MMP, the Legislature explicitly stated its intent to "facilitate the prompt identification of qualified patients and their designated primary caregivers in order to avoid unnecessary *arrest and prosecution* of these individuals and provide needed guidance to law enforcement officers." (Stats. 2003, ch. 875, § 1(b)(1), italics

added.) The Legislature's reference to "arrest and prosecution" in its declaration of intent supports the interpretation that the obligation of local law enforcement agencies and officers to not arrest persons with valid identification cards also precludes them from taking subsequent steps in the criminal justice process, including prosecuting protected persons under a local ordinance.

A further indication of the legislative intent underlying subdivision (e) of section 11362.71 comes from the absence of the limiting phrases deemed significant to the interpretation of the statutory provisions at issue in *Inland Empire*. Those provisions used the phrases "shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5 or 11570" (§ 11362.775) and "shall not be subject, on that sole basis, to criminal liability under Section 11357, 11358, 11359, 11360, 11366, 11366.5 or 11570" (§ 11362.765, subd. (a)). The Supreme Court relied on the words "sole" and "solely" and the enumeration of specific sections of state law to conclude that the Legislature intended the immunity granted by sections 11362.765 and 11362.775 to have a narrow reach. (See *Inland Empire*, *supra*, 56 Cal.4th at pp. 748-749.) Accordingly, the absence of such phrases from subdivision (e) of section 11362.71 indicates the Legislature did not intend similar limitations to apply to the prohibition of arrest. Thus, a comparison of the wording of subdivision (e) of section 11362.71 to the text of sections 11362.765 and 11362.775 supports the conclusion that the Legislature intended the prohibition of arrests of certain persons to extend to all such arrests, whether made under local or state law.

This view of legislative intent comports with the Supreme Court's interpretation of the UCSA set forth in *O'Connell*. The court described the UCSA as defining controlled substances (including marijuana), regulating their use, and setting penalties for their unlawful possession and distribution. As to the effect of the UCSA on local legislation, the court stated:

> "The comprehensive nature of the UCSA in defining drug crimes and specifying penalties (including forfeiture) is so thorough and detailed as to manifest the Legislature's intent to preclude local regulation [of crimes and penalties]. The USCA accordingly occupies the field of penalizing crimes involving controlled substances, thus impliedly preempting the City's forfeiture ordinance to the extent it calls for the forfeiture of vehicles used 'to acquire or attempt to acquire' [citation] controlled substances regulated under the UCSA." (*O'Connell, supra,* 41 Cal.4th at p. 1071.)

In *Inland Empire*, the court refused to extend the statements in *O'Connell* about occupying the field of penalizing crimes to the field of land use regulation, stating "there is no similar evidence in this case of the Legislature's intent to preclude local regulation of facilities that dispense medical marijuana." (*Inland Empire, supra,* 56 Cal.4th at p. 757.) Thus, the field preemption described in *O'Connell* did not apply in *Inland Empire* because different areas of law—crimes versus land use regulation—were involved.

We conclude the UCSA and the MMP's prohibition of arrests manifest the Legislature's intent to fully occupy the area of criminalization and decriminalization of activity directly related to marijuana. As a result, the criminalization provision in FCC section 10.60.080(A) is "in conflict with" and thus preempted by the UCSA and subdivision (e) of section 11362.71. (Cal. Const., art. XI, § 7.) Alternatively, the criminalization provision is void because it is not "consistent with" the MMP as required by subdivision (c) of section 11362.83. Consequently, Kirby has stated a cause of action for the preemption of the part of FCC section 10.60.080(A) that provides a person violating the ordinance is "guilty of a misdemeanor and shall be subject to the penalties as set forth in Chapter 1.12 …."

As to the scope of this cause of action, we conclude it does not provide a basis for invalidating the entire ordinance because the ordinance's severability provision expresses the intent that the invalidity of any part shall not affect the validity of any other part of the ordinance. (FCC, § 10.60.090.) Thus, the only provision subject to invalidation under this legal theory is the provision classifying violations of the ordinance as misdemeanors. (Cf. *Kelly, supra,* 47 Cal.4th at pp. 1048-1049 [§ 11362.77 invalidated

only to the extent of its unconstitutional application; lower court erred in voiding § 11362.77 in its entirety].) To further explain the scope of the cause of action stated by Kirby, we note the possibility that failing to abate a public nuisance involving the cultivation of medical marijuana might be prosecuted as a misdemeanor. This *indirect* criminal sanction is not preempted because the failure to abate a public nuisance after notice is recognized as a separate crime by the Legislature. (See Pen. Code, § 373a [person who allows a public nuisance to exist on his or her property after reasonable notice in writing is guilty of a misdemeanor]; see also, § 11362.83, subd. (b).)

C. Federal Preemption

1. County's Contention

County argues that allowing state preemption of the ordinance would create a conflict between state law and the federal Controlled Substances Act (CSA) (21 U.S.C. § 801 et seq.), which prohibits the use of marijuana (a Schedule I drug) except as part of a federally-approved research program.

2. Federal Preemption and the CSA

Clause 2 of article VI of the United States Constitution provides that the laws of the United States shall be the supreme law of the land, notwithstanding anything in the law of a state to the contrary. Consequently, under the supremacy clause, Congress has the power to preempt state law.

Courts considering whether Congress exercised its power to preempt state law are guided by a strong presumption that Congress has not exercised that power in areas historically addressed under the state police power. (*Anaheim*, *supra*, 187 Cal.App.4th at p. 757.) Such areas include the regulation of medical practices and state criminal sanctions for drug possession. (*Ibid*.)

The federal preemption argument presented in this case must be analyzed under Congress's explicit statement regarding the CSA's effect on state law, which is set forth in section 903 of title 21 of the United States Code:

> "No provision of [the CSA] shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, *unless there is a positive conflict* between that provision of this subchapter and that State law *so that the two cannot consistently stand together*." (Italics added.)

Under this provision, courts considering preemption under the CSA need only consider two of the four species of federal preemption—namely, conflict preemption and obstacle preemption. (*Anaheim, supra,* 187 Cal.App.4th at p. 758.)

In this case, County's argument about federal preemption is not fully developed because County has not (1) acknowledged that Congress addressed the preemptive effect of the CSA in section 903 of title 21 of the United States Code; (2) presented arguments identifying and applying the tests for conflict or obstacle preemption; or (3) addressed *Anaheim* and its conclusion that the CSA does not preempt the CUA or the MMP.

3. Conflict Preemption

Federal conflict preemption is difficult to establish because it requires showing that it is impossible to comply with the requirements of both federal and state law. (*Wyeth v. Levine* (2009) 555 U.S. 555, 573; *Anaheim, supra,* 187 Cal.App.4th at p. 758.) In this case, it is possible for local law enforcement agencies and officers to comply with their obligation not to arrest persons with valid identification cards and comply with the CSA. The CSA does not require local law enforcement officers to arrest persons who possess or cultivate marijuana. Indeed, Congress does not have the authority to compel state or local officers to enforce federal regulatory programs. (*Anaheim, supra,* at p. 761.) Consequently, a local officer can forgo making a marijuana arrest without violating federal law. Therefore, we agree with the Fourth District's conclusion that "[n]o positive

conflict exists because neither the CUA nor the MMPA requires anything that the CSA forbids." (*Id*. at p. 759.) Also, the state statutes do not forbid anything that the CSA requires.

For purposes of illustration, we note that a positive conflict would exist if California's statutes *required* local governments to grow and distribute marijuana because those acts are forbidden by the CSA. (See 21 U.S.C. §§ 841(a)(1), 844(a); see generally, *Gonzales v. Raich* (2005) 545 U.S. 1 [application of CSA provisions criminalizing the manufacture, distribution or possession of marijuana to intrastate growth and use of medical marijuana did not violate Commerce Clause].)

4. Obstacle Preemption

Under the test for obstacle preemption, the state law must yield if the purpose of the federal act cannot otherwise be accomplished—that is, its operation is frustrated and its provisions refused their natural effect. The marijuana provisions in the CSA are capable of being enforced by federal officials and its purpose accomplished even if local officers abide by their obligation under section 11362.71, subdivision (e) and refrain from arresting persons with valid identification cards. California's statutes do not require local officials (1) to interfere with federal enforcement efforts or (2) to aid and abet individuals violating the CSA. Therefore, the CUA and MMP are not obstacles to federal law under applicable preemption principles.

5. Summary

The obligation imposed on local law enforcement agencies and officers by section 11362.71, subdivision (e) -- to accept an identification card as protection against arrest for certain medical marijuana-related activities, except upon reasonable cause to believe that the information contained in the card is false or fraudulent, is not preempted by

federal law. Thus, County cannot rely on federal preemption to save the criminalization provision in FCC section 10.60.080(A) from being invalidated under state law.[10]

III. A RIGHT TO PERSONALLY CULTIVATE

A. Contentions of the Parties

Kirby contends that she and "all medical marijuana patients have an express right to cultivate at least six marijuana plants for personal use." She argues that subdivisions (a), (c) and (f) of section 11362.77, when read together, "provide that localities must allow cultivation of as least six mature or 12 immature marijuana plants for personal medical use and localities are *only* authorized by the Legislature 'to exceed' these quantities, not to subvert them."

County argues that there is no constitutional right to cultivate marijuana and the limited immunity provided by the CUA and the MMP to prosecution under specifically enumerated provisions of state criminal law does not immunize marijuana cultivation from the application of local land use regulations. We agree.

B. Compassionate Use Act

One basis for the claim that qualified patients have a right of access to medical marijuana is the declaration that a purpose of the CUA is "[t]o ensure that seriously ill Californians have the *right* to obtain and use marijuana for medical purposes." (§ 11362.5, subd. (b)(1)(A), italics added.)

The California Supreme Court addressed the wording of this provision by stating that the statute did not create a broad right to use marijuana without hindrance or inconvenience. (*Inland Empire*, *supra*, 56 Cal.4th at p. 746, quoting *Ross v. RagingWire*

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10 "Just as the federal government may not commandeer state officials for federal purposes, a [local government] may not stand in for the federal government and rely on purported federal preemption to implement federal legislative policy that differs from corresponding, express state legislation concerning medical marijuana." (*Anaheim*, *supra*, 187 Cal.App.4th at pp. 761-762.)

Telecommunications, Inc. (2008) 42 Cal.4th 920, 928 (*Ross*).) The court carefully explained the scope of the CUA by stating that "the only 'right' to obtain and use marijuana created by the [CUA] is the right of 'a patient, or ... a patient's primary caregiver, [to] possess[ ] or cultivate[ ] marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician' without thereby becoming subject to punishment under sections 11357 and 11358 of the Health and Safety Code. (*Id*., § 11362.5, subd. (d).)" (*Ross, supra*, at p. 929.) Thus, the substantive provisions of CUA creates a narrow exception that applies only in the circumstances specified. (*Inland Empire, supra*, at p. 746.) When the specified circumstances exist, the patient is not subject to "two specific state statutes prohibiting the possession and cultivation of marijuana, sections 11357 and 11358, respectively." (*Id*. at p. 744; see *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 774 ["the [CUA] created a limited defense to crimes, not a constitutional right to obtain marijuana"].)

The Supreme Court's interpretation of the CUA and its description of the narrow "right" created by that statute is controlling. Consequently, the declaration of purpose in section 11362.5, subdivision (b)(1)(A) does not establish an absolute right to obtain and use marijuana. The "right" to obtain and use medical marijuana only allows specified persons to avoid punishment under sections 11357 (possession) and 11358 (cultivation). (§ 11362.5, subd. (d).) Consequently, we conclude the CUA does not create a right to cultivate medical marijuana that is beyond the reach of local land use regulations. Therefore, County's land use ban on cultivation is "not in conflict with" the CUA. (Cal. Const., art. XI, § 7.)

C. Medical Marijuana Program

1. Statutory Text from section 11362.77

The subdivisions of the MMP that Kirby contends establish an express right to cultivate medical marijuana provide:

> "(a) A qualified patient or primary caregiver may possess no more than eight ounces of dried marijuana per qualified patient. In addition, a qualified patient or primary caregiver may also maintain no more than six mature or 12 immature marijuana plants per qualified patient.
>
> "(b) If a qualified patient or primary caregiver has a doctor's recommendation that this quantity does not meet the qualified patient's medical needs, the qualified patient or primary caregiver may possess an amount of marijuana consistent with the patient's needs.
>
> "(c) Counties and cities may retain or enact medical marijuana guidelines allowing qualified patients or primary caregivers to exceed the state limits set forth in subdivision (a). [¶] … [¶]
>
> "(f) A qualified patient or a person holding a valid identification card, or the designated primary caregiver of that qualified patient or person, may possess amounts of marijuana consistent with this article." (§ 11362.77.)

Kirby argues the phrases "may possess" contained in subdivisions (a) and (f) of section 11362.77 create a right to possess medical marijuana and the phrase "may also maintain" creates a right to cultivate marijuana plants.

2. Case Law

In *Kelly, supra,* 47 Cal.4th 1008, the California Supreme Court held that section 11362.77 was invalid insofar as it established quantity *limits* that restricted the CUA provisions allowing patients to possess an amount of medical marijuana reasonably related to the patient's current medical needs. The quantity limits were regarded as an impermissible legislative amendment of an initiative measure and, thus, unconstitutional. (*Kelly, supra,* at pp. 1030 & 1046.) Despite the unconstitutionality, the Supreme Court refused to sever section 11362.77 in its entirety from the MMP, stating the section continued to have legal significance and could operate as part of the MMP even though it could not restrict a CUA defense. (*Kelly, supra,* at pp. 1048-1049.) To implement this conclusion, the court regarded the quantity limits in section 11362.77 as "a 'safe harbor' protecting against prosecution of those who legitimately possess amounts within those limits." (*Kelly, supra,* at p. 1015, fn. 5.)

The fact that section 11362.77 has been declared unconstitutional in certain applications does not support the conclusion that its provisions have no effect. (See *Nunes*, *supra*, 215 Cal.App.4th at p. 1203.) Consequently, to the extent County argues that there is no reason for this court to consider section 11362.77 because it was declared unconstitutional, we reject that argument.

In *Maral*, *supra*, 221 Cal.App.4th 975, the Third Appellate District upheld a city ordinance that banned medical marijuana dispensaries and all cultivation of medical marijuana within the city limits. (*Id*. at p. 979.) The court concluded that the MMP did not preempt the authority of cities to regulate, even prohibit, the cultivation of marijuana. (*Ibid*.) The court made no mention of section 11362.77 and, as a result, did not analyze the statutory text relied upon by Kirby to support her argument about the creation of a right to cultivate medical marijuana. Consequently, under the rules of appellate practice, *Maral* is not precedent for how the text of section 11362.77 should be interpreted. (See *Kinsman v. Unocal Corp.*, *supra*, 37 Cal.4th at p. 680 [opinions are not authority for propositions not considered by the court].)

Similarly, section 11362.77 was not analyzed in *Inland Empire* because that case involved a local ban of medical marijuana dispensaries, not a ban of personal cultivation. Therefore, we do not regard *Inland Empire* as binding authority for how the provisions in section 11362.77 should be interpreted, despite the fact *Inland Empire* establishes or reiterates certain general principles relating to the CUA and the MMP and provides guidance for applying preemption doctrine to local land use ordinances.

Based on the lack of published opinions analyzing the text of subdivisions (a), (c) and (f) of section 11362.77, we will discuss each of those subdivisions.

3. Subdivision (a) of Section 11362.77

The first step of statutory interpretation is to examine the words of the statute for ambiguity or a plain meaning. (*Flood v. Wyeth Laboratories, Inc.* (1986) 183 Cal.App.3d 1272, 1277; see *Coburn v. Sievert* (2005) 133 Cal.App.4th 1483, 1494-1495.)

The safe harbor provision of subdivision (a) of section 11362.77 states that qualified patients "may possess" and "may also maintain" specified amounts of marijuana. For purposes of this appeal, we assume that this language is ambiguous and can reasonably be interpreted broadly to create a statutory right, or narrowly to define a requirement relating to the scope of the safe harbor from criminal liability. The narrow interpretation is supported by section 11362.765, subdivision (a), which states that, "[s]ubject to the requirements of this article," certain individuals shall not be subject to criminal liability under the specified state statutes. The use of the phrase "requirements of this article" creates the possibility that the safe harbor provision in subdivision (a) of section 11362.77 is one of the requirements of the MMP—that is, persons are required to possess or maintain no more that the specified amounts of marijuana (i.e., eight ounces of dried marijuana and six mature or 12 immature plants) to be protected by the safe harbor.

When resolving an ambiguity in a statute, we construe the provision in context and with reference to the entire statutory scheme and are aided by the ostensible objects to be achieved by the legislation, the evils to be remedied, the legislative history, and public policy. (*POET, LLC v. State Air Resources Bd.* (2013) 218 Cal.App.4th 681, 749.) These additional sources of legislative intent do not point in a single direction, but contain ambiguities. For instance, one of the stated intentions of the Legislature was to enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects. (Stats. 2003, ch. 875, § 1(b)(3).) This statement suggests it might be appropriate to read the MMP in a manner that precludes local restrictions on the cultivation of medical marijuana.

Despite the sweeping nature of some of the declarations of intent relating to the enactment of the MMP, our Supreme Court has determined that, as a statutory scheme, the substantive provisions of the MMP are framed in narrow and modest terms. (*Inland Empire*, *supra*, 56 Cal.4th at p. 753.) The Supreme Court's view of the modest reach of the MMP is one of the factors that guides our resolution of the ambiguity in the statutory text and in the extrinsic materials that aid statutory construction. Another factor is the absence of any indication in the statutory provisions or declarations of legislative intent that local land use regulations were among "the evils to be remedied" by the MMP. (*POET*, *supra*, 218 Cal.App.4th at p. 749.) These factors lead us to the presumption that, absent a clear indication of preemptive intent from the Legislature, local land use regulations are *not* preempted by state statute. (*Inland Empire*, *supra*, 56 Cal.4th at p. 743.) Applying this presumption, we conclude subdivision (a) of section 11362.77 does not clearly indicate the Legislature intended to create a statutory "right" to possess and maintain marijuana in the stated quantities that preempts the authority of local governments to regulate land use. Thus, we conclude subdivision (a) of section 11362.77 can be characterized as creating a *limited* "right" to safe harbor protections from criminal liability or as defining a "requirement" as that word is used in the phrase "requirements of this article" used in section 11362.765, subdivision (a). Under either characterization, subdivision (a) of section 11362.77 does not establish an express statutory right to possess and cultivate medical marijuana that trumps local land use regulation.

4. Subdivision (f) of Section 11362.77

Subdivision (f) of section 11362.77 states that specified persons "may possess amounts of marijuana consistent with this article." Contrary to Kirby's position, this language does not create an absolute statutory right to possess medical marijuana. The provision clearly states that such possession must be "consistent with this article"—that is, consistent with the MMP. The MMP has a limited or modest reach and, consistent

with this modest reach, cultivation of medical marijuana is subject to local land use regulations. In other words, subdivision (f) of section 11362.77 does not create a right to possess marijuana that extends beyond the substantive provisions of the MMP, which (1) provide defenses for specified persons against criminal liability under specified state statutes and (2) prohibit arrests in certain situations.

5. Subdivision (c) of Section 11362.77

Subdivision (c) of section 11362.77 states that local governments may "enact medical marijuana guidelines allowing qualified patients or primary caregivers to exceed the state limits set forth in subdivision (a)." Kirby argues the Legislature, by explicitly authorizing only increases in the allowable quantities of medical marijuana, implicitly prevented local governments from decreasing those quantities.

We assume, for purposes of discussion, that subdivision (c) of section 11362.77 contains at least two ambiguities. First, the term "guidelines" reasonably could be interpreted to include land use regulations. Second, the express authority to enact a particular type of guideline reasonably could be interpreted to preclude guidelines of a type not expressly authorized.

As earlier, our resolution of these statutory ambiguities is affected by the distinction between the field of criminal law and the field of land use regulations. The MMP is narrowly drawn and operates primarily in the field of criminal law. Within that field, the express authority granted by subdivision (c) of section 11362.77 to increase allowable quantities supports the inference that the Legislature intended to prevent local governments from reducing allowable quantities and thereby expanding *criminal liability* for activities involving medical marijuana. The inference that the Legislature did not intend local governments to expand criminal liability is reasonable because (1) defining crimes and penalties for controlled substances is not an area of law traditionally within the power of local governments and (2) the maxim of statutory construction that to

express or include one thing implies the exclusion of the other. (Black's Law Dict. (9th ed. 2009) p. 661, col. 2 [definition of *expression unius est exclusion alterius*].)

In this appeal, we must determine what inferences about legislative intent are appropriate in the field of land use regulation. It is less plausible to interpret the Legislature's express authorization of local "guidelines" that increase the quantities of marijuana eligible for safe harbor protection from criminal liability to mean that the Legislature intended to restrict the traditional authority of local governments to regulate land use. This inference is less plausible because we must presume the Legislature did not intend to preempt local land use regulations absent a clear indication of such an intent. (*Inland Empire, supra,* 56 Cal.4th at p. 743.) There is no clear indication of an intent for subdivision (c) of section 11362.77 to restrain the authority of local government to reduce the number of plants under cultivation or ban cultivation outright as a matter of local land use regulation. Based on the presumption, we interpret subdivision (c) of section 11362.77 to mean that local land use regulations may restrict the personal cultivation of medical marijuana, even if local governments lack the authority to narrow the safe harbor protections for purposes of *criminal liability*.

In summary, we conclude that the provisions of section 11362.77 do not create an express statutory "right" to personally cultivate medical marijuana that is beyond the reach of local land use regulations.[11] Therefore, any such "right" is subject to the authority of local governments to hinder, inconvenience or ban the cultivation of medical marijuana through zoning and land use ordinances.

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11 Kirby argues that the nuisance provisions of County's ordinance are invalid pursuant to Civil Code section 3482, which states in full: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." It follows, from our conclusion that there is no express statutory right to cultivate medical marijuana free from the restrictions of local land use regulations, that Civil Code section 3482 does not apply to County's ordinance.

IV. A RIGHT TO OBTAIN AND USE MEDICAL MARIJUANA

The third ground Kirby asserts for challenging the ordinance's ban on personal cultivation is that it conflicts with California law by impermissibly infringing her right as a disabled person to obtain and use medical marijuana. Kirby argues that "in this case it would be entirely unjustified to extend *Inland Empire*, *Browne*, or *Maral* because it would harm *this disabled Petitioner* (as well as legions or other medical marijuana patients), in a manner this is 'inimical to' the will of the California electorate and Legislature."

Kirby supports this ground by repeating her arguments about "rights" created by the CUA and subdivisions (a) and (f) of section 11362.77 and her argument that the Legislature implicitly forbade localities from enacting regulations that undermine the cultivation quantities established by the MMP. (See § 11362.77, subd. (c).) We have rejected these arguments previously and need not discuss them further.

Kirby also argues that *Maral* is distinguishable because it involved a ban on cultivation by a small city (1.9 square miles, population 8,400) while County's ordinance affects a much greater geographical area, which makes obtaining medical marijuana much more difficult for disabled persons within the jurisdiction. We do not address the differences in area and population as a ground for distinguishing *Maral* because we have not relied on that case in reaching our conclusions about the effect of the CUA and MMP on County's ordinance. We have conducted an independent analysis of the statutory text referenced by Kirby and concluded that the ban on cultivation is not invalid under California's preemption doctrine.

Therefore, the arguments presented by Kirby in the section of her brief arguing she has a right to obtain and use medical marijuana do not convince us to alter our conclusion that local governments may regulate or ban the cultivation of medical marijuana because land use regulations are not preempted by the CUA or the MMP.

V. LEAVE TO AMEND*

We will not direct the trial court to grant Kirby leave to amend her pleading because Kirby has not carried her burden of showing she could allege facts stating another cause of action. To be granted leave, a plaintiff must show in what manner she can amend her complaint and how that amendment will change the legal effect of this pleading. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) This burden is not carried by the assertion of an abstract right to amend. (*McKelvey v. Boeing North American, Inc.* (1999) 74 Cal.App.4th 151, 161, superseded by statute on a different point in *Grisham v. Philip Morris U.S.A., Inc.* (2007) 40 Cal.4th 623, 637, fn. 8.)

Here, Kirby argued she should be given at least one opportunity to amend her original pleading, but she (1) has identified no additional facts that she could allege and (2) has presented no new legal theory. Therefore, she has not demonstrated she should be granted leave to amend.

DISPOSITION

The judgment or order of dismissal relating to Kirby's complaint is reversed and the superior court is directed to vacate its June 13, 2014, order sustaining the demurrer and to enter a new order overruling the demurrer. Kirby shall recover her costs on appeal.

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FRANSON, J.

WE CONCUR:

_____
HILL, P.J.

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PEÑA, J.

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* See footnote, *ante*, page 1.

PROOF OF SERVICE

I, Kamala Buchanan, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the City of San Francisco, County of San Francisco, California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. I am an employee of the AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, and my business address is 39 Drumm Street, California 94111.

On January 11, 2016, I served the following document(s):

Petition for Review

In the Following Case:
Diana Kirby v. County of Fresno, et al.

on the parties stated below by the following means of service:

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__X__ By U.S. Mail enclosing a true copy in a sealed envelope in a designated area for outgoing mail, addressed with the aforementioned addressees. I am readily familiar with the business practices of the ACLU of Northern California for collection and processing of correspondence for mailing with the United States Postal Service and correspondence so collected and processed is deposited with the United States Postal Service on the same date in the ordinary course of business.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on January 11, 2016 at San Francisco, California.

_____
Kamala Buchanan, Declarant