Civil No. C069622

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

CITY OF AUBURN, a California Municipal Corporation,

Plaintiff and Respondent,

v.

SIERRA PATIENT AND CAREGIVER EXCHANGE, INC., et al.,

Defendants and Appellants

Appeal from the Superior Court of California, County of Placer
Hon. Colleen Nichols, Judge
Case No. S-CV-29599

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND PROPOSED *AMICI CURIAE* BRIEF IN SUPPORT OF PLAINTIFF AND RESPONDENT CITY OF AUBURN

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, THIRD APPELLATE DISTRICT, DIVISION

Court of Appeal Case Number: C069622

Superior Court Case Number: S-CV29599

FOR COURT USE ONLY

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APPELLANT/PETITIONER: SIERRA PATIENT & CAREGIVER EXCHANGE, INC.

RESPONDENT/REAL PARTY IN INTEREST: CITY OF AUBURN

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

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

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

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

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

Full name of interested entity or person	Nature of interest (Explain):
(1) California State Association of Counties	Amice Curiae
(2) League of California Cities	Amice Curiae
(3) Sierra Patient & Caregiver Exchange, Inc.	Defendants and Appellants
(4) Richard G. Miller	Ownership Interest in Sierra Patient & Caregiver Exchange, Inc.
(5) City of Auburn	Plaintiff and Respondent

☐ Continued on attachment 2.

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

Date: June 19, 2012

Stephen A. McEwen
(TYPE OR PRINT NAME)

▶ Stephen A. McEwen
(SIGNATURE OF PARTY OR ATTORNEY)

TO THE HONORABLE PRESIDING JUSTICE:

Pursuant to Rule 8.200, subdivision (c), of the California Rules of Court, the League of California Cities ("League") and California State Association of Counties ("CSAC") submit this application to file an *amici curiae* brief in support of Plaintiff and Respondent City of Auburn ("City" or "Auburn"). This application is timely made within 14 days after the filing date of the reply brief on the merits.

IDENTITY OF *AMICI CURIAE* AND STATEMENT OF INTEREST

The League is an association of 469 California cities dedicated to protecting and restoring local control in order to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide—or nationwide—significance. The Committee has identified this case as being of such significance.

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

This case implicates the constitutional police power of counties and cities to protect the health, safety, and general welfare of the public from what many elected City Councils and Boards of Supervisors have legislatively determined to be the negative secondary effects of medical marijuana dispensaries. The proliferation of such dispensaries has created challenging

land use problems for counties and cities statewide. In the face of wide ranging and increasing reports of crimes and other threats to public safety from marijuana dispensaries, collectives, or cooperatives, many local governments have enacted permanent zoning prohibitions. By one advocacy group's recent count, 76 cities and 9 counties have adopted moratoria prohibiting marijuana distribution facilities and 178 cities and 20 counties have adopted permanent prohibitions of one sort or another. (See http://www.safeaccessnow.org/article.php?id=3165.) These land use decisions represent legislative judgments made by local elected legislative bodies about the wisdom of and need for local control over a particularly vexing and highly unusual land use – one that is illegal under federal law in all circumstances.

In this case, the trial court decided correctly that neither the Compassionate Use Act ("CUA") nor the Medical Marijuana Program Act ("MMPA") prevented the City of Auburn from exercising its constitutional police power to adopt an ordinance prohibiting medical marijuana distribution facilities. In so doing, the trial court followed settled constitutional separation of power principles. Courts must defer to the legislative judgments made by local elected officials, who are in the best position to evaluate local conditions, community needs, and the public welfare. In recognition of this principle, courts have also repeatedly emphasized that a local regulation should not be found to be preempted by State law unless it is clear that a true conflict exists. No such conflict exists here.

Appellants' argument that the State's medical marijuana laws somehow preempt local zoning prohibitions of medical marijuana dispensaries not only undermines the principle of local land use control, it hastens to find a conflict between Auburn's regulation and state law where none exists. Appellants' argument ignores the express language of both the CUA and the MMPA, cases interpreting them, settled principles of statutory construction, and recently-enacted amendments to the MMPA, all of which together establish clearly that

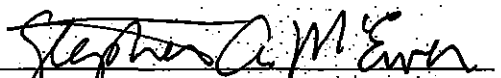
neither the voters nor the Legislature in any manner intended or undertook to prohibit the local land use regulations enacted by the City of Auburn and over 200 other cities and counties statewide.

Because the League and CSAC have a unique and important insight into the matters implicated in this litigation, they apply to this Court for permission to file this *amici curiae* brief in support of the City of Auburn on this matter of statewide significance. Applicant League and CSAC have appeared as *amicus curiae* before this and other courts on matters involving similar issues, including *Pack v. Superior Court of Los Angeles County (City of Long Beach)*, Case No. B228781 (2d App. Dist., Div. 3); *People v. Wildomar Patients Compassionate Group, Inc.*, Case No. E052728 (4th App. Dist., Div. 2); and *Americans for Safe Access v. City of Los Angeles*, Case No. B230436 (2d App. Dist., Div. 8).

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

Dated: June 19, 2012

BURKE, WILLIAMS & SORENSEN, LLP

By: 

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[PROPOSED] BRIEF OF *AMICI CURIAE* IN SUPPORT OF PLAINTIFF AND RESPONDENT CITY OF AUBURN

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I. ISSUE PRESENTED

This case presents the question of whether the Compassionate Use Act of 1996 ("CUA") and the Medical Marijuana Program Act of 2003 ("MMPA") prevent a city from exercising its constitutional police power authority to prohibit the establishment and operation of a medical marijuana collective, cooperative, or dispensary within its jurisdictional boundaries.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Appellants argue that the MMPA preempts Auburn's zoning prohibition of medical marijuana establishments. (AOB 10-20.) Appellants' contention that state law preempts local zoning prohibitions, and thereby *requires* all counties and cities to permit storefront medical marijuana dispensaries, with absolutely no guidance from the state regarding the scope of permissible regulations, is erroneous and was rejected expressly in *City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, and *County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861, and by subsequent amendments to the MMPA. Contrary to appellants' argument, neither the CUA nor the MMPA preempts local land use regulation—including prohibition of medical marijuana dispensaries and neither law provides an affirmative defense or immunity from traditional nuisance abatements actions based on violations of a local municipal code. The trial court, therefore, properly enjoined appellants from operating a storefront marijuana distribution facility in violation of the Auburn Municipal Code.

In enjoining appellants' municipal code violations, the trial court recognized the importance of local control over fundamental land use decisions, such as whether a particular activity is appropriate for a particular community. Cities and counties have a duty to protect the public safety. They fulfill their duty by exercising their constitutional authority to regulate various activities including, for example, their permissibility or location. Under our constitutional form of government, cities and counties act through their elected

city councils and boards of supervisors, who are charged with making the land use decisions for their respective cities and counties.

In the particular case of medical marijuana distribution, the need for local control is paramount. Cities and counties statewide have confronted the widespread proliferation of marijuana distribution facilities. There have been wide ranging and increasing reports of crimes and other threats to public safety from marijuana dispensaries, collectives or cooperatives, demonstrating that these facilities increase the risk to public safety and welfare through murders, assaults, burglaries, robberies, illegal narcotics sales, driving under the influence, teen substance abuse, and other crimes and public nuisances. In particular, nearby schools, businesses, churches, and residential areas suffer due to marijuana distribution facilities.[1]

There is no constitutional or statutory basis to restrict counties and cities in their efforts to address and eliminate these land use and public safety problems. We start first with the fact that there is no constitutional right to use or distribute the substance. For decades, marijuana advocates have litigated every conceivable basis for claiming a right to use or distribute marijuana, including constitutional rights, statutory rights, and medical necessity. Yet, courts have consistently rejected these arguments, and have ruled repeatedly that there is no constitutional right, no statutory right, no medical necessity defense, and no fundamental policy to protect marijuana use or distribution.

More important for this discussion, the CUA and the MMPA do not preempt cities' constitutional authority to regulate and restrict marijuana distribution facilities. The issue has now been addressed and resolved twice, first by the Court of Appeal in *Kruse* and *Hill*.

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

What is more, the *Hill* Court recognized that if there ever had been doubt on the issue, one of two recent amendments to the MMPA eliminated it: "If there was ever any doubt about the Legislature's intention to allow local governments to regulate marijuana dispensaries, and we do not believe there was, the newly enacted [Health and Safety Code][2] section 11362.768, has made clear that local governments *may* regulate dispensaries." (*County of Los Angeles v. Hill, supra*, 192 Cal.App.4th at p. 868 [emphasis added].)

Subsequent to the decision in *Hill*, the Legislature acted yet again. It amended Section 11362.83 to eliminate any remaining doubt about cities' and counties' authority not only to regulate marijuana distribution facilities' existence and operations, but to impose both civil and criminal penalties for violating such regulations.

It is important to recall that marijuana remains illegal under federal law. Moreover, the CUA and MMPA provide only an *affirmative defense* to criminal prosecution under California law for certain medicinal uses. It is simply not the case that the CUA and/or MMPA create right to use or distribute marijuana. The constitutional right to regulate marijuana distribution facility locations and compliance with local ordinances should be recognized and protected by the courts. *Amici curiae* League of California Cities ("League") and California State Association of Counties ("CSAC") support the City's request that the trial court's order enjoining appellants from operating an unpermitted storefront marijuana dispensary be upheld.

As demonstrated below, not only have appellants failed to establish state law preemption, they cannot do so. First, cities and counties have broad constitutional powers to protect public safety and regulate land uses such as those here. Second, California law recognizes that cities and counties are not preempted from restricting marijuana distribution facilities. Third, California's

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

marijuana laws, the CUA and the MMPA, not only anticipate such local regulation, they expressly allow it. The League and CSAC therefore respectfully urge the Court to affirm the trial court's issuance of a preliminary injunction, to reject appellants' meritless state law preemption arguments, and preserve traditional local control over a challenging and potentially dangerous land use activity.

III. LEGAL ANALYSIS

A. Counties And Cities Have Plenary Constitutional Authority To Control Land Uses Within Their Borders.

Local police power derives from the California Constitution, not from legislative grace. Article XI, section 7, of the California Constitution authorizes counties and cities to enact and enforce regulations in order to protect the public's health, safety, and welfare. Article XI, section 7 states: "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." Pursuant to this constitutional police power authority, "counties and cities have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law." (*Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 886.) "Apart from this limitation, the police power of a county or city under this provision is as broad as the police power exercisable by the legislature itself." (*Ibid.*)

The constitutional police power includes, of course, the authority to regulate local land uses. (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1151.) "Comprehensive zoning has long been established as being a legitimate exercise of the police power. [Citations.]" (*Beverly Oil Co. v. City of Los Angeles* (1953) 40 Cal.2d 552, 557.) "[A] city's power to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state." (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 782.) "The power of cities and counties to zone land use in

accordance with local conditions is well entrenched." (*IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 89.) In fact, while "[t]he Legislature has specified certain minimum standards for local zoning regulations (Gov. Code, § 65850 *et seq.*)," it has also "carefully expressed its intent to retain the maximum degree of local control (*see, e.g., id.*, §§ 65800, 65802)." (*IT Corp. v. Solano County Bd. of Supervisors, supra,* 1 Cal.4th 81, 89.) "[L]ocal control is at the heart of the [zoning] process." (*Bownds v. City of Glendale* (1980) 113 Cal. App. 3d 875, 880.)

The principle of local control over land use is also supported by a long line of United States Supreme Court decisions dating back to *Village of Euclid v. Amber Realty Co.* (1926) 272 U.S. 365. In *Village of Euclid*, the Supreme Court rejected a Fourteenth Amendment challenge to a zoning ordinance and held that such police power ordinances were valid unless they were "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." (*Id.* at p. 395.) In *Berman v. Parker* (1954) 348 U.S. 26, the Supreme Court observed that the police power's scope was broad and that, [s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." (*Id.* at p. 32.) In *Warth v. Seldin* (1975) 422 U.S. 490, the Court further observed that "zoning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local legislative authorities." (*Id.* at p. 508, fn. 18.)

Based on these well-established authorities, courts view local land use decisions with great deference. (*Consolidated Rock Products Co. v. City of Los Angeles* (1962) 57 Cal.2d 515, 522-523.) As courts have long recognized, such deference is required because the proper exercise of the police power "is primarily a legislative and not a judicial function." (*Id.* at p. 522.) Local officials, rather than legislators or judges, are in the best position to evaluate the interests and needs of a community and make determinations about appropriate

land uses. (*Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1248.) "The wisdom of the [zoning regulation] is a matter for legislative determination, and even though a court may not agree with that determination, it will not substitute its judgment for that of the zoning authorities if there is any reasonable justification for their action." (*Carty v. City of Ojai* (1978) 77 Cal.App.3d 329, 333, fn. 1.)

Accordingly, every intendment is in favor of the validity of local land use regulations. (*Big Creek Lumber Co. v. County of Santa Cruz, supra,* 38 Cal.4th 1139, 1152.) A court will uphold a local land use regulation unless the party challenging the law can demonstrate that it is arbitrary or unreasonable. (*Lockard v. City of Angeles* (1949) 33 Cal.2d 453, 462; *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643 674, fn. 16.) A court's function in reviewing a local land use regulation "is to determine whether the record shows a reasonable basis for the action of the zoning authorities, and, if the reasonableness of the ordinance is fairly debatable, the legislative determination will not be disturbed." (*Lockard v. City of Los Angeles, supra,* 33 Cal.2d 453, 462.)

Furthermore, a county's or city's broad constitutional police power to enact legislation is subject to state law preemption only if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by implication. (Cal. Const. art. XI, § 7; *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1067.) A local law contradicts general law if it is inimical to state law. (*Id.* at p. 1068.) "[L]ocal legislation enters an area that is 'fully occupied' by general law when the Legislature has expressly manifested its intent to 'fully occupy' the area [citation], or when it has impliedly done so in light of one of the following indicia of intent: '(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (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; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the' locality [citations]." (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 898.)

"Whether state law preempts a local ordinance is a question of law that is subject to *de novo* review." (*Roble Vista Associates v. Bacon* (2002) 97 Cal.App.4th 335, 339.) "The party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption." (*Big Creek Lumber Co. v. County of Santa Cruz, supra,* 38 Cal.4th at p. 1149.)

There is a strong presumption against preemption of local land use regulations. (*Garcia v. Four Points Sheraton LAX* (2010) 188 Cal.App.4th 364, 374.) "[I]n view of the long tradition of local regulation and the legislatively imposed duty to preserve and protect the public health, preemption may not be lightly found." (*People ex rel. Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476, 484.) "[W]hen local government regulates in an area over which it traditionally exercised control, such as the location of particular land uses, California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is not preempted by state statute." (*Id.* at p. 1149 [emphasis added].) Indeed, the California Supreme Court has "been particularly 'reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another.'" (*Big Creek Lumber Co. v. County of Santa Cruz, supra,* 38 Cal.4th at p. 1149 [quoting *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 707].)

Medical marijuana is just such a "field" in which there are "significant local interest[s] to be served that may differ from one locality to another." (*Big Creek Lumber Co. v. County of Santa Cruz, supra,* 38 Cal.4th at p. 1149.) As

Auburn observes in its Respondent's Brief, California's 469 cities and 58 counties are diverse in size, population, and land use. (Respondent's Brief ("RB") at p. 1.) While several California cities and counties have determined to allow them, medical marijuana dispensaries are not appropriate or compatible with surrounding land uses in every community. Some communities, like Auburn, are predominantly residential and do not have sufficient commercial or industrial space to accommodate medical marijuana uses. Some communities have determined, in their legislative discretion, that due to the illegality of marijuana, numerous safety concerns accompany medical marijuana distribution that are not present with pharmacies and other medical-related facilities. They have found that dispensaries raise concerns of security, marijuana abuse, and of providing an environment for other illicit drugs.[3] Courts have upheld such legislative judgments, noting that marijuana has a "substantial and detrimental effect on the health and general welfare of the American people." (*Lepp v. Gonzalez* (N.D. Cal., Aug. 2, 2005) 2005 U.S. Dist. LEXIS 41525, at *26; *Phillips v. City of Oakland* (N.D. Cal. 2007) No. C 07-3885 CW, 2007 U.S. Dist. LEXIS 94651 at *5-6.) In *County of Los Angeles v. Hill, supra*, 192 Cal.App.4th 861, the court held that "medical marijuana dispensaries and pharmacies are not 'similarly situated' for public health and safety purposes and therefore need not be treated equally." (*Id.* at p. 871.) In reaching this conclusion, the court observed that the presence of large amounts of cash and marijuana at medical marijuana dispensaries makes them attractive targets for crime. (*Ibid.*)

Accordingly, the "strong presumption" against state law preemption applies to the CUA and MMPA. It is appellants' burden to prove state law preemption by showing "a clear indication of preemptive intent from the

[3] The Auburn City Council considered similar evidence of negative secondary effects prior to adopting its zoning ban on dispensaries. (Respondent's Motion for Judicial Notice ("MJN"), Ex. A.)

Legislature." (*Big Creek Lumber Co. v. County of Santa Cruz, supra*, 38 Cal.4th at p. 1149.) Appellants cannot satisfy this burden of demonstrating preemption.

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

In analyzing whether the Legislature intended to preempt local zoning prohibitions of medical marijuana dispensaries and distribution facilities, it is important to note that there is no federal or state constitutional right to use medical marijuana. Every case, state and federal, that has considered the issue has concluded that there is no constitutional right to obtain, use or dispense marijuana for medicinal purposes. (*See, e.g., Ross v. Raging Wire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 928-929 [rejecting a freedom of association/privacy rights argument and holding that the CUA did not create "a broad right to use marijuana without hindrance or inconvenience," but rather created only a limited criminal defense]; *County of Los Angeles v. Hill, supra*, 192 Cal.App.4th at pp. 871-872 [rejecting equal protection challenge because marijuana remains illegal under federal law, and thus not similarly situated to other medical uses]; *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 773 [holding that the CUA created a limited defense to crimes, not a constitutional right to obtain marijuana and that a person has no more constitutional right to cultivate, stockpile, and distribute marijuana under the Compassionate Use Act than he has to create a dispensary to collectively purchase, stockpile, and distribute any other legitimate prescription medication"]; *County of Santa Cruz v. Ashcroft* (N.D. Cal. 2003) 279 F. Supp. 2d 1192 [finding "no fundamental right to cultivate or possess marijuana for medicinal use"]; *Raich v. Ashcroft* (N.D. Cal. 2003) 248 F. Supp.2d 918, 928 ["Plaintiffs ... do not have a fundamental, constitutional right to obtain and use [marijuana] for treatment."]; *United States v. Osburn* (C.D. Cal. 2003) 2003 U.S. Dist. LEXIS 8607, at *2; *Lepp v. Gonzalez, supra*, 2005 U.S. Dist. LEXIS 41525, at *26; *Phillips v. City of Oakland, supra*, 2007 U.S. Dist. LEXIS 94651, at *5-6 [rejecting equal

protection and due process claims, holding "[e]ven though [the CUA] permits the personal use of marijuana for medical reasons, the commercial sale of medical marijuana is still illegal under California's criminal law"]; *United States v. Cannabis Cultivator's Club* (N.D. Cal. Feb 25, 1999) 1999 U.S. Dist. LEXIS 2259 at *2-3 [holding that defendants did not have a constitutional right to obtain marijuana from a medical cannabis cooperative free of government police power].)

Other federal court decisions involving local regulation of dispensaries similarly undermine the assertion of a constitutional (or federal statutory) right to use, obtain, and distribute medical marijuana. (*See, e.g., James v. City of Costa Mesa* (9th Cir. 2012) 2012 U.S. App. LEXIS 10168, *1 [rejecting an ADA challenge to a local prohibition on medical marijuana dispensaries because marijuana is illegal and cannot be prescribed legally].) In addition, California cases decided prior to the 1996 enactment of the CUA concluded there was no constitutional violation in the state's adoption and enforcement of its general criminal laws governing marijuana. (*National Organization for Reform of Marijuana Laws v. Gain* (1979) 100 Cal. App. 3d 586 [rejecting privacy, equal protection, due process and other constitutional claims].)

The California and United States Supreme Courts both have recognized that the federal Controlled Substances Act (21 U.S.C. § 801 *et seq.*) makes marijuana use illegal despite California's medical marijuana law. (*Ross v. Raging Wire Telecommunications, Inc., supra*, 42 Cal.4th at p. 926; *Gonzales v. Raich* (2005) 545 U.S. 1.) Stated simply, marijuana use is not a constitutional right, is not protected by a "fundamental public policy," and remains illegal under federal law regardless of California's medical marijuana law.

C. There Is No Conflict Between Local Zoning Ordinances Prohibiting Medical Marijuana Distribution Facilities and the CUA and MMPA.

Appellants do not dispute that medical marijuana lacks constitutional protection or that counties and cities have a constitutional authority to control land use activities. In fact, appellants concede that local governments can "restrict and regulate" medical marijuana dispensaries. (AOB 14.) Appellants, however, contend that there is a conflict between a complete zoning prohibition against medical marijuana distribution facilities and the provisions of the MMPA. Under appellants' preemption theory, the MMPA strips all local governments of the basic zoning authority to say "no" to medical marijuana facilities, even though such a land use activity is indisputably illegal under federal law. As appellants would have it, all local governments must allow for medical marijuana dispensaries somewhere within their boundaries irrespective of the size and characteristics of the community,[4] and despite the potential hazards of such a land use and the continuing illegality of medical marijuana under federal law. Appellants' argument has no merit.

Appellants overlook the limited scope of the State's medical marijuana laws. The CUA and MMPA do no more than provide limited immunity from criminal prosecution under specific state statutes. Neither law limits or affects local control over land use decisions, much less compels every county and city in the State to allow medical marijuana dispensaries. As demonstrated by the plain language of the CUA and MMPA, their legislative history, and controlling case law, these laws recognize that counties and cities may allow dispensaries. They do not require them to do so, however.

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[4] As Auburn correctly points out, appellants' preemption argument would require an entirely residential city with no commercial district to allow dispensaries. (RB 1.) Neither the CUA nor the MMPA says any such thing, of course, and neither may be reasonably construed as requiring such an absurd result.

I. The CUA Does Not Limit Local Government's Constitutional Police Power

Although appellants do not argue that the CUA preempts local law, the CUA provides the necessary starting point for analyzing the MMPA and understanding the limited effect of the State's medical marijuana laws. The CUA is narrow in scope and does not address or affect, in any way, local control over basic land use decisions.

In pertinent part, the CUA provides that: "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(d).) The CUA specifically provides that nothing therein "shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others." (§ 11362.5, subd. (b)(2).) Consistent with this provision, the ballot arguments in support of Proposition 215 carefully assured voters that the CUA "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." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), rebuttal to argument against Prop. 215, p. 61, *Amici Curiae's* Motion for Judicial Notice ("RJN"), Ex. A.)[5]

Notably, the CUA does not contain any express language that requires cities and counties to allow dispensaries or prohibits cities from regulating such land uses. (*City of Claremont v. Kruse*, *supra*, 177 Cal.App.4th at pp. 1172-1175.) As *Kruse* observed, "[t]he operative provisions of the CUA do not address zoning or business licensing decisions." (*Id.* at pp. 1172-1173.) Furthermore, "[t]he CUA does not authorize the operation of a medical

[5] Such ballot materials are relevant to courts' analysis of preemption claims. (Evid. Code, § 452; *White v. Davis* (1975) 13 Cal.3d 757, 775, fn. 11.)

marijuana dispensary, nor does it prohibit local governments from regulating such dispensaries." (*Id.* at p. 1173 [citations omitted].)

Rather, as interpreted by the California Supreme Cour , he CUA provides only a "limited immunity" from state criminal prosecution to qualified patients and heir designated primary caregivers. (*People v. Mower* (2002) 28 Cal.4th 457, 470; *see also, People v. Kelly* (2010) 47 Cal.4th 1008, 1014 [" he CUA . . . provides only an affirmative defense to a charge of possession or cultivation"].) The CUA did not "legalize" marijuana or dispensaries for its distribution. (*Ross v. Raging Wire Telecommunications, supra*, 42 Cal.4th at p. 926.) More importantly, "[t]he CUA does not authorize medical marijuana patients or heir primary caregivers to engage in sales of marijuana." (*People ex rel. Trutanich v. Joseph* (2012) 204 Cal.App.4 h 1512, 1521.)

The Supreme Court has further emphasized that the CUA "is a narrow measure with narrow ends. . . . [T]he proponents' ballot arguments reveal a delicate tightrope walk designed to induce voter approval, which we would upset were we to stretch the proposition's limited immunity to cover that which its language does not. The Act's drafters took pains to note that neither relaxation much less evisceration of the state's marijuana laws was envisioned." (*People v. Mentch* (2008) 45 Cal.4th 274, 286, fn. 7 [citations omitted].) The Court has specifically declined to extend the CUA outside the context of criminal law enforcement activities, noting that, with one narrow exception (irrelevant here), " he act's operative provisions speak exclusively to the criminal law." (*Ross v. Raging Wire Telecommunications, Inc., supra,* 42 Cal.4th at p. 928.)

Courts have consistently rejected efforts to expand the meaning of the CUA. In *People v. Urziceanu, supra,* 132 Cal.App.4th 747, the Court of Appeal observed hat the CUA only "created a limited defense to crimes, not a constitutional right to obtain marijuana" and hat there was no "constitutional right to cultivate, stockpile, and distribute marijuana." (*Id.* at p. 773.) The

Supreme Court similarly rejected a "constitutional right" argument in *Ross v. Raging Wire Telecommunications, supra*, 42 Cal.4th 920. There, a medical marijuana patient argued that his employer's decision to discharge him for using medical marijuana violated his right to use marijuana for medicinal purposes. (*Id.* at pp. 926-927.) The employee characterized his "right" as a constitutional right to privacy. (*Id.* at p. 932.) The Supreme Court observed, however, that unlike legal prescription drugs, marijuana remains illegal. (*Id.* at p. 925.) The Court, thus, refused to recognize a "right of medical self-determination" in the use of marijuana. (*Id.* at pp. 932-933.) The Court concluded that the CUA did not create "a broad right to use marijuana without hindrance or inconvenience," but rather created only a limited criminal defense to punishment under Health and Safety Code sections 11357 and 11358. (*Id.* at pp. 928-929.)

In light of the CUA's plain language, its legislative history, and the appellate decisions interpreting the CUA, there is no reasonable argument that the CUA preempts a local zoning prohibition against medical marijuana dispensaries, either expressly or by implication. (*City of Claremont v. Kruse, supra*, 177 Cal.App.4th at pp. 1172-1176.) As set forth below, the same is true for the MMPA.

2. The MMPA Does Not Protect Appellants' Conduct or Restrict Local Control Over Land Use Decisions

The MMPA, like the CUA, does not create a right to establish a marijuana distribution facility, and makes no express mention of land use, zoning or licensing. While the MMPA expands on the CUA in certain respects, it does so only within narrowly drawn limits, *i.e.*, with respect to the use of marijuana by qualified patients and their designated caregivers. The MMPA nowhere purports to restrict or usurp the constitutional police power of local governments to enact zoning and land use regulations regarding or affecting the cultivation and distribution of medical marijuana. (*City of Claremont v. Kruse, supra*, 177 Cal.App.4th at pp. 1175-1177; *County of Los Angeles v. Hill, supra,*

192 Cal.App.4th at pp. 868-869.) Therefore, the MMPA does not conflict with a local zoning prohibition or expressly or impliedly preempt such an ordinance.

When the MMPA was passed, its sponsors described it as "the very best we could hope to get enacted into law" – and they consequently crafted the statute's reach with great care. (Sen. John Vasconcellos & Assembyman Mark Leno, letter to Assembly Speaker Herb Wesson, Sep. 10, 2003, 1 Assem. J. (2003-2004 Reg. Sess.) p. 3932, RJN, Ex. B.) Notably, the legislative history for the MMPA contains no mention whatsoever of land use regulation, and no hint that the Legislature would have understood the bill to affect such matters or preempt local authority in this area. (*City of Claremont v. Kruse*, *supra*, 177 Cal.App.4th at p. 1175.) Furthermore, "Medical marijuana dispensaries are not mentioned in the text or history of the MMP. The MMP does not address the licensing or location of medical marijuana dispensaries, nor does it prohibit local governments from regulating such dispensaries." (*Ibid.*) In the absence of such language, the argument that the MMPA expressly occupies the field of medical marijuana regulation must fail. (*Ibid.*)

Any contention that the MMPA occupies the field by implication, and therefore preempts a local prohibition, also must fail. The original provisions of the MMPA expressly authorized supplementary local regulations: "Nothing in this article [*i.e.*, the MMPA] shall prevent a . . . local governing body from adopting and enforcing laws consistent with this article." (§ 11362.83.) "Preemption by implication of legislative intent may not be found when the Legislature has expressed its intent to permit local regulations. Similarly, it should not be found when the statutory scheme recognizes local regulation." (*People ex rel. Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476, 485; *City of Claremont v. Kruse*, *supra*, 177 Cal.App.4th at p. 1176.)

Appellants focus their argument on an alleged conflict between the MMPA and a local zoning prohibition. (AOB 10-16.) Again, this argument has no merit in light of the plain language and legislative history of the MMPA.

(*City of Claremont v. Kruse*, *supra*, 177 Cal.App.4th at pp. 1175-1176.) The purpose of the MMPA was to "[c]larify the scope of the application of [the CUA] and . . . address additional issues that were not included within [the CUA], and that must be resolved in order to promote the fair and orderly implementation of [the CUA]." (Stats. 2003, ch. 875, § 1; §§ 11362.7, *et seq.*) In order to do so, the principal provisions of the MMPA created a voluntary program for the issuance of identification cards to qualified patients and primary caregivers. (§§ 11362.71 - 11362.76.) The MMPA also elaborates on the definitions of many of the terms used somewhat loosely in the CUA (§ 11362.7), identifies certain places and circumstances where smoking marijuana is prohibited (§ 11362.79), and attempts to quantify the amount of marijuana that a qualified patient may possess without risking criminal prosecution. (§ 11362.77.) None of these provisions of the MMPA conflict with or otherwise preempt a local zoning prohibition.

The MMPA also contains two core operative provisions, sections 11362.765 and 11362.775, which expanded the limited protections granted by the CUA and "immuniz[ed] from prosecution a range of conduct ancillary to the provision of medical marijuana to qualified patients." (*People v. Mentch* (2008) 45 Cal.4th 274, 290.) In making their preemption argument, appellants rely on the language of section 11362.775. (AOB 11.) This reliance is misplaced. Neither section 11362.775 nor section 11362.765 immunized storefront dispensaries from civil nuisance abatement actions or limited traditional local zoning discretion to determine whether medical marijuana distribution is appropriate for a particular community.

Section 11362.765 addresses individual qualified patients, primary caregivers, and other specified individuals, providing that such persons "shall not be subject, on that sole basis, to criminal liability under Section 11357 [possession of marijuana], 11358 [cultivation of marijuana], 11359 [possession for sale], 11360 [transportation], 11366 [maintaining a place for the sale, giving

away or use of marijuana], 11366.5 [making available premises for the manufacture, storage or distribution of controlled substances], or 11570 [abatement of nuisance created by premises used for manufacture, storage or distribution of controlled substance]." (§ 11362.765, subd. (a).) "In *Mentch*, the California Supreme Court 'closely analyzed' section 11362.765 and concluded that the statute provides criminal immunity for specified individuals under a narrow set of circumstances: '[T]he immunities conveyed by section 11362.765 have three defining characteristics: (1) they each apply only to a specific group of people; (2) they each apply only to a specific range of conduct; and (3) they each apply only against a specific set of laws.'" (*City of Claremont v. Kruse*, *supra*, 177 Cal.App.4th at p. 1171.) Section 11362.765, therefore, does not affect local zoning laws.

Section 11362.775 addresses collective and cooperative endeavors to cultivate marijuana, but it is similarly narrow in scope and does not affect local zoning laws. The CUA itself did "not allow for collective cultivation and distribution of marijuana by someone who is a qualified patient for the benefit of other qualified patients or primary caregivers," and consequently such persons faced potential criminal prosecution for distribution of marijuana and related charges. (*People v. Urziceanu*, *supra*, 132 Cal.App.4th at p. 769.) The MMPA addressed the cultivation issue: "Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570." (§ 11362.775.) This represents a "dramatic change" in the protection afforded qualified persons (*People v. Urziceanu*, *supra*, 132 Cal.App.4th at p. 785), but as the plain language indicates, the statute's focus remains on the criminal process. (*Ibid.*; *People v. Kelly* (2010) 47 Cal.4th 1008,

1015, fn. 5; *City of Claremont v. Kruse*, *supra*, 177 Cal.App.4th at p. 1171; *see also*, *County of Los Angeles v. Hill*, *supra*, 192 Cal.App.4th at p. 869, fn. 5.)

Appellants argue that the immunity provided by Health and Safety Code section 11362.775 from "state criminal sanctions" under section 11570, California's "drug den" abatement law, precludes cities from enforcing their own nuisance abatement regulations against medical marijuana dispensaries.[6] (AOB 11-12.) Section 11570 provides that the use of land for illegal drug activities constitutes a public nuisance and sets forth civil nuisance abatement remedies, but does not specify any criminal sanction for such activities.[7] Appellants contend, therefore, that the inclusion of section 11570 represents a legislative declaration that dispensaries operating within the parameters of the MMPA are not a public nuisance *per se* under *any* state or local statute and are not subject to civil nuisance abatement actions. Appellants argue further that the Legislature, by allegedly immunizing medical marijuana dispensaries from all civil nuisance abatement actions, authorized medical marijuana dispensaries to exist. Therefore, appellants argue, Civil Code section 3482 shields medical marijuana dispensaries from local nuisance abatement actions and a blanket prohibition of dispensaries contradicts the MMPA. (AOB 16.) Civil Code section 3482 provides that "Nothing which is done or maintained under the

[6] Appellants overlook the fact that Auburn did not bring this nuisance abatement action under section 11570. In the language of section 11362.775, Auburn did not seek injunctive relief "solely on the basis" that appellant is a medical marijuana dispensary. Rather, Auburn prosecuted this action under its Zoning Code and business license regulations. Auburn was entitled to a preliminary injunction because Appellants have ignored both the Zoning Code and business license regulations that apply to all other individuals and businesses in Auburn. (CT 6-7.)

[7] Section 11570 provides that "Every building or place used for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance, precursor, or analog specified in this division, and every building or place wherein or upon which those acts take place, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance."

express authority of a statute can be deemed a nuisance." This argument is incorrect.

As a preliminary matter, section 11362.775 does not address collective or cooperative "distribution" activities and therefore could not possibly preempt a local prohibition of a distribution facility. In fact, a court of appeal recently rejected the assertion that section 11362.775 immunized storefront dispensaries from civil nuisance abatement actions under section 11570. In *People exrel. Trutanich v. Joseph, supra*, 204 Cal.App.4th 1512, the Second District Court of Appeal held that neither section 11362.765 nor 11362.775 immunized, much less affirmatively authorized, the use of land for the group distribution or dispensing of medical marijuana. In *Joseph*, the City of Los Angeles obtained a civil injunction against the operator of a storefront dispensary called Organica on the ground that the dispensary's activities violated section 11570 and constituted a public nuisance. (*Id.* at p.1516.) The dispensary operator argued that, by virtue of sections 11362.765 and 11362.775, his activities were immune from a civil nuisance abatement action brought under section 11570. (*Id.* at p. 1521.) The court of appeal disagreed and held, "Neither section 11362.775 nor section 11362.765 of the MMPA immunizes the marijuana sales activity conducted at Organica." (*Id.* at p. 1523.) The Court observed that section 11362.775 merely protected "group activity 'to cultivate marijuana for medical purposes,'" but did "not cover dispensing or selling marijuana." (*Ibid.*) The operation of a storefront medical marijuana dispensary, therefore, would not be protected under the MMPA. The Court noted further that section 11362.765 allowed reasonable compensation for services provided to a qualified patient, "but such compensation may be given only to a 'primary caregiver.'" (*Ibid.*) Because the dispensary operator was not a primary caregiver to the hundreds of customers that came to his dispensary, he was not entitled to any of the limited protections offered by the MMPA. (*Ibid.*)

The same rationale applies to appellants. Appellants distributed marijuana at their facility in the same manner as the dispensary operators in *Joseph*. In *Joseph*, the defendants operated from a storefront location and sold marijuana products to the public on a walk-in basis. (*People ex rel. Trutanich v. Joseph*, *supra*, 204 Cal.App.4th at pp. 1516-1518.) Appellants similarly opened their facility to the public and sold marijuana products to anyone who came through the front door. (CT 35, 139-140, 148-150, 159, 201-203.) Accordingly, appellants' reliance on section 11362.775 as a shield for the dispensary activities is misplaced – appellants' distribution of medical marijuana is outside the MMPA and is subject to nuisance abatement under any applicable law. Appellants cannot rely on section 11362.765 either, because they did not show that they were primary caregivers for any of their more than 500 customers.

Furthermore, even if section 11362.775 could be interpreted to protect some form of medical marijuana distribution, this provision, by its own terms, would not apply to a civil nuisance abatement action brought under a local ordinance. If a statutory provision is unambiguous, courts "presume that the Legislature, or, in the case of an initiative measure, the voters, intended the meaning apparent on the face of the statute." (*City of Claremont v. Kruse*, *supra*, 177 Cal.App.4th at p. 1172.) The language of section 11362.775 is unambiguous – it only provides for immunity from state *criminal* sanctions under the specific state law provisions identified. Appellants, however, interpret section 11362.775 in such a way that it significantly alters the plain language of the statute. Appellants take the phrase "state criminal sanctions" and expand it repeatedly to include civil nuisance abatement. Appellants then expand the list of statutory immunities in section 11362.775 to include local zoning regulations, even though such laws are not listed in section 11362.775. This tortured, self-serving interpretation is at odds with the plain language of section 11362.775 and basic rules of statutory interpretation.

In *County of Los Angeles v. Hill*, *supra*, 192 Cal.App.4th 861, the court of appeal rejected just such an attempt to expand the meaning of section 11362.775 to include immunity from civil nuisance abatement actions brought under local ordinances. In *Hill*, the Court of Appeal affirmed a preliminary injunction issued against an unpermitted medical marijuana dispensary that opened in violation of county zoning regulations that allowed dispensaries to operate, but required dispensaries to obtain a conditional use permit and business license. The county regulation also prohibited dispensaries from opening within a 1,000-foot radius of schools, playgrounds, parks, libraries, places of religious worship, child care facilities, and youth facilities. (*Id.* at pp. 864-865.) The Court rejected the argument that the criminal immunity under the drug den abatement law (section 11570) established in section 11362.775 prohibited the county from pursuing civil nuisance abatement remedies. (*Id.* at pp. 868-869.) The Court stated, "The limited statutory immunity from prosecution under the 'drug den' abatement law provided by section 11362.775 does not prevent the County from applying its nuisance laws to MMD's that do not comply with its valid ordinances." (*Id.* at p. 868.) Consistent with the Supreme Court's ruling in *Ross*, the Court held that the MMPA "does not confer on qualified patients and their caregivers the unfettered right to cultivate or dispense marijuana anywhere they choose." (*Id.* at p. 869.) Rather, "[t]he County's constitutional authority to regulate the particular manner and location in which a business may operate (Cal. Const., art. XI, § 7) is unaffected by section 11362.775." (*Ibid.*) This holding by itself defeats appellants' argument that section 11362.775 means more than it says.

Appellants' argument about section 11570 is erroneous for another reason. In appellants' view, section 11570 is purely a civil statute and its inclusion in the MMPA demonstrates an intent to preempt civil nuisance abatement remedies, notwithstanding that section 11362.775 only refers to "state criminal sanctions." (AOB 11.) According to appellants, a civil nuisance

abatement action is "the sole enforcement remedy" for a public nuisance under section 11570. (Reply Brief at p. 8.) Again, this is incorrect. Contrary to appellants' assumption, a person or entity is subject to criminal prosecution for creating a nuisance as defined in section 11570. Penal Code section 372 states that "Every person who maintains or commits any public nuisance, the punishment for which is not otherwise prescribed, or who willfully omits to perform any legal duty relating to the removal of a public nuisance, is guilty of a misdemeanor." Penal Code section 372 applies squarely to section 11570, which establishes a public nuisance, "the punishment for which is not otherwise prescribed." Thus, although section 11570 *et seq.* addresses procedures for civil nuisance abatement, a person who creates a nuisance under section 11570 is also subject to misdemeanor prosecution pursuant to Penal Code section 372.

In making their argument that civil nuisance abatement is the only tool to enforce section 11570 (Reply Brief at p. 8), appellants rely on *Lew v. Superior Court* (1993) 20 Cal.App.4th 866. Amazingly, *Lew* reached the exact opposite conclusion. *Lew* addressed the question of whether a party could bring a small claims damages action based on the existence of a section 11570 public nuisance or whether an abatement action under section 11571 *et seq.* was the only available remedy. *Lew* held, "There is nothing in this statutory scheme for the abatement of 'drug houses' that forecloses the lesser remedy of an action for damages in small claims court by a private party." (*Id.* at p. 872.) Thus, contrary to appellants' assertion, a civil nuisance abatement action is not the "sole enforcement remedy" for a nuisance as defined by section 11570. It is well-established that criminal prosecution is an existing remedy for any public nuisance. Civil Code section 3491 provides that the remedies against a public nuisance are indictment or information, a civil action, or abatement. There is no indication in the plain language of section 11570 *et seq.* that the Legislature intended to foreclose the traditional remedy of a criminal prosecution for those individuals who create or maintain drug house nuisances.

Appellants also cite *People v. Urziceanu*, *supra*, 132 Cal.App.4th 747, to support their argument that section 11362.775 shielded medical marijuana dispensaries from both criminal and civil liability. (Reply Brief at p. 2.) However, in the passage of *Urziceanu* cited by appellants, the Court of Appeal merely says that the MMPA exempts qualifying patients and primary caregivers who collectively or cooperatively cultivate medical marijuana from "criminal sanctions" under "the laws declaring the use of property for these purposes a nuisance."[8] (*People v. Urziceanu*, *supra*, 132 Cal.App.4th at p. 785.) *Urziceanu* does not hold, as appellants suggest, that the MMPA exempted dispensaries from civil nuisance abatement actions.

Therefore, the inclusion of section 11570 in section 11362.775 does not demonstrate any legislative intent to preempt the application of local civil nuisance abatement remedies to medical marijuana dispensaries. At the time the Legislature enacted the MMPA, there were numerous, well-established state and local laws pertaining to civil nuisance abatement. If the Legislature had intended the MMPA to provide immunity from local civil nuisance abatement procedures, or from Code of Civil Procedure section 731, Civil Code sections

[8] The passage from *Urziceanu* cited by appellants reads as follows: "Thus, the Legislature also exempted those qualifying patients and primary caregivers who collectively or cooperatively cultivate marijuana for medical purposes from criminal sanctions for possession for sale, transportation or furnishing marijuana, maintaining a location for unlawfully selling, giving away, or using controlled substances, managing a location for the storage, distribution of any controlled substance for sale, and the laws declaring the use of property for these purposes a nuisance." (*People v. Urziceanu*, *supra*, 132 Cal.App.4th at p. 785.) In their Reply Brief, appellants add the word "or" just before the phrase "the laws declaring the use of the property for those purposes a nuisance." (Reply Brief at p. 3.) By doing so, appellants create the mistaken impression that *Urziceanu* was applying section 11362.775 to both criminal sanctions and civil nuisance abatement actions. As the full passage from the opinion demonstrates, *Urziceanu* did no such thing – it is a criminal case addressing the applicability of a criminal defense to acts that predated the MMPA. (*People v. Urziceanu*, *supra*, 132 Cal.App.4th at pp. 758-759.)

3491 *et seq.*, Penal Code section 372, and/or Government Code sections 25845 *et seq.* and 38771 *et seq.*, it could have easily said so. The Legislature did not do any of those things. Courts and litigants cannot insert statutory provisions that the Legislature itself has not seen fit to include. Consequently, the Legislature's limited reference to Section 11570 should not be read to affect anything other than state criminal sanctions under Section 11570.

While the Legislature may have intended to make access to medical marijuana easier, it did so only by removing criminal liability under specific state laws. It did not override local zoning regulations and require every county and city in the state to allow medical marijuana establishments. "'[A]bsent a clear indication of preemptive intent from the Legislature,' we presume that local regulation 'in an area of which [the local government] traditionally has exercised control' is not preempted by state law." (*Action Apartment Assn., Inc. v. City of Santa Monica*, *supra*, 41 Cal.4th at p. 1242.) Appellants failed to demonstrate any such indication of preemptive intent over local land use decisions. Because the MMPA did not expressly or impliedly prohibit the application of local zoning and building codes to medical marijuana dispensaries, appellants' preemption argument based on a conflict between state law and local law must fail.

3. *Naulls* and *Kruse* Confirm That Local Governments May Prohibit The Establishment Of Medical Marijuana Dispensaries

The decisions in *City of Corona v. Naulls* (2008) 166 Cal.App.4th 418, and *City of Claremont v. Kruse*, *supra*, 177 Cal.App.4th 1153, further confirm the conclusion that counties and cities can adopt and apply local zoning and nuisance abatement laws against medical marijuana dispensaries, even when such local regulations are the equivalent of a complete prohibition.

In *Naulls*, the defendant applied for a business license and wrote on his application that the proposed business activity was "Misc. Retail." (*Id.* at pp.

420-421.) He later elaborated to a city employee that the business would sell "miscellaneous medical supplies." (*Id.* at p. 421.) The city issued the license based on the defendant's misrepresentations. (*Ibid.*) Shortly thereafter, the city enacted a moratorium against marijuana dispensaries. (*Ibid.*) After receiving his business license and after the moratorium went into effect, the defendant made it known to city staff members that he was operating his business as a medical marijuana dispensary. (*Ibid.*) The city filed a complaint against him and obtained a preliminary injunction preventing him from operating a marijuana dispensary. (*Id.* at pp. 422-423.)[9]

The Court of Appeal affirmed the issuance of the preliminary injunction. (*Id.* at p. 427.) The Court observed that the defendant failed to provide accurate information on his application and that the city would not have issued the license had the defendant provided an accurate business description. (*Id.* at p. 428.) Moreover, the Court noted, the defendant did not follow the procedures applicable to land uses that were not listed in the zoning code. (*Ibid.*) Quoting the trial court, the Court of Appeal found that the Corona Municipal Code was "'drafted in a permissive fashion'" and that "'[a]ny use not enumerated therein is presumptively prohibited.'" (*Id.* at p. 431.) "[W]here a particular use of land is not expressly enumerated in a city's municipal code as constituting a *permissible* use, it follows that such use is *impermissible*." (*Id.* at p. 433 [emphasis in original].)

Naulls did not expressly consider the issue of state law preemption, but it supports the proposition that medical marijuana establishments are presumptively prohibited if the applicable local code is silent with regard to such land uses. *Naulls* further supports the conclusion that a county or city can enjoin a medical marijuana establishment that opens in violation of such a presumptive prohibition and other applicable business regulations.

[9] Here too, as in *Naulls*, appellants misrepresented the nature of their operation to secure City approvals. (CT 135, 137.)

Furthermore, *Naulls* confirms that counties and cities can enact temporary zoning moratoriums against medical marijuana establishments.

In *City of Claremont v. Kruse*, *supra*, 177 Cal.App.4th 1153, the Second District Court of Appeal confronted the state law preemption issue head on. It held unequivocally that the CUA and MMPA do not preempt local land use regulations. In *Kruse*, the defendant applied for a business license and permit for a medical marijuana dispensary. (*Id.* at p. 1158.) At the time of the application, such a use was not an enumerated use under the city's zoning code and was, therefore, prohibited expressly under the city's permissive zoning scheme. (*Ibid.*) Accordingly, the city denied the defendant's application and informed him of his appeal rights. (*Id.* at p. 1159.) The defendant, however, started operating his dispensary without any permits. (*Ibid.*) The city subsequently enacted a moratorium against medical marijuana dispensaries.[10]

[10] In *Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 754, fn. 4, the Court of Appeal observed that *Kruse* involved a temporary moratorium. *Kruse* confirmed beyond any dispute that a city may impose a temporary moratorium against, and therefore may regulate, medical marijuana dispensaries. The specific facts of *Kruse*, however, demonstrate that the decision does not apply only in cases involving a temporary moratorium, as *Qualified Patients* suggested erroneously. As noted above, the defendant in *Kruse* applied for a business permit *prior* to the enactment of a moratorium in Claremont. (*City of Claremont v. Kruse*, *supra*, 177 Cal.App.4th at pp. 1159-1160.) Furthermore, the defendant commenced operation of his medical marijuana dispensary before Claremont's moratorium. (*Ibid.*) Claremont's moratorium prohibited the issuance of any permits to medical marijuana dispensaries, but did not make it illegal to do anything that had been considered lawful prior to the moratorium. (*Id.* at p. 1160.) Therefore, since the defendant in *Kruse* applied for a business license and commenced his operation prior to the moratorium, the issues to be decided in court were whether the defendant established a lawful use before the moratorium was effective and whether the city was required to grant him a business license at the time of the application. The Court of Appeal answered both questions in the negative because Claremont's zoning code did not enumerate medical marijuana dispensaries and, thus, prohibited them expressly in all zoning districts. (*Id.* at pp. 1164-1166.)

(*Id.* at p. 1160.) When the defendant refused to cease his operations, the City obtained a preliminary injunction. (*Id.* at pp. 1160-1162.)

Relying on *Naulls*, the Court of Appeal upheld the preliminary injunction. The Court concluded first that the dispensary was a nuisance *per se* because it violated the municipal code. (*Id.* at pp. 1164-1165.) "Defendants' operation of a nonenumerated and therefore *expressly prohibited* use, without obtaining a business license and tax certificate, created a nuisance *per se* under section 1.12.010." (*Id.* at p. 1165 [emphasis added].)

Next, the Court of Appeal methodically reviewed the CUA and MMPA in accordance with well-established principles of local police power preemption, and concluded as follows:

- "Zoning and licensing are not mentioned in the findings and declarations that precede the CUA's operative provisions. Nothing in the text or history of the CUA suggests it was intended to address local land use determinations or business licensing issues. The CUA accordingly did not expressly preempt the City's enactment of the [dispensary] moratorium or the enforcement of local zoning and business licensing requirements." (*City of Claremont v. Kruse*, *supra*, 177 Cal.App.4th at pp. 1172-1173);
- "The operative provisions of the MMP, like those in the CUA, provide limited criminal immunities under a narrow set of circumstances . . .The MMP does not address the licensing or location of medical marijuana dispensaries, nor does it prohibit local governments from regulating such dispensaries. Rather, like the CUA, the MMP expressly allows local regulation . . . Nothing in the text or history of the MMP precludes the City's adoption of a temporary moratorium on issuing permits and licenses to medical marijuana dispensaries, or the City's enforcement of licensing and zoning requirements applicable to such dispensaries." (*Id.* at p. 1175); and

• "Neither the CUA nor the MMP impliedly preempt the City's actions in this case. Neither statute addresses, much less completely covers the areas of land use, zoning and business licensing. Neither statute imposes comprehensive regulation demonstrating that the availability of medical marijuana is a matter of "statewide concern," thereby preempting local zoning and business licensing laws. ... *Neither the CUA nor the MMP compels the establishment of local regulations to accommodate medical marijuana dispensaries*. The City's enforcement of its licensing and zoning laws and its temporary moratorium on medical marijuana dispensaries do not conflict with the CUA or the MMP." (*Id.* at pp. 1175-1176 [emphasis added].)

The holding that neither the CUA nor the MMPA compel counties and cities to adopt laws to accommodate medical marijuana dispensaries is significant. If a county or city does not have to accommodate medical marijuana land uses, it follows necessarily that a county or city can prohibit them expressly or by simply omitting any reference to medical marijuana dispensaries in the applicable zoning code. (*City of Corona v. Naulls*, *supra*, 166 Cal.App.4th at pp. 431-433 [holding that, where medical marijuana dispensaries are not included among the uses of land enumerated in a city's zoning code, they are presumptively prohibited].)

Furthermore, of particular relevance to the precise question posed in this case, *Kruse* contains an extensive discussion on the law of public nuisance, and specifically recognizes the distinction between the state criminal sanctions addressed by the CUA and MMPA and unaffected local nuisance regulations. Rejecting the defendants' argument that the dispensary in that case could not be enjoined because "all sales of marijuana in this case complied with California's medical marijuana laws," the Court of Appeal noted that: "The trial court's determination that defendants' operation of a medical marijuana dispensary constituted a nuisance *per se* was based not on violations of state law, however,

but on violations of the City's municipal code," which the Court of Appeal found entirely appropriate. (*City of Claremont v. Kruse*, *supra*, 177 Cal. App. 4th at p. 1164.)

4. A.B. 2650 Confirmed The Holdings In *Naulls* And *Kruse* That Local Governments Do Not Have To Accommodate Medical Marijuana Dispensaries

In the wake of the *Naulls* and *Kruse* decisions, which held that local governments need not accommodate medical marijuana dispensaries, the Legislature amended the MMPA in 2010 by adding Health and Safety Code section 11362.768 (Stats. 2010, ch. 633; hereinafter "A.B. 2650"). Section 11362.768, which became effective January 1, 2011, provides: "No medical marijuana cooperative, collective, dispensary, operator, establishment, or provider who possesses, cultivates, or distributes medical marijuana pursuant to this article shall be located within a 600-foot radius of a school." (Health and Safety Code, § 11362.768, subd. (b).) The 600-foot restriction applies to medical marijuana establishments that have a storefront or mobile retail outlet which ordinarily would require a local business license. (Health and Safety Code, § 11362.768, subd. (e).)

Furthermore, of critical importance here, the new law expressly recognized and affirmed local governments' authority to establish more stringent land use regulations than the 600-foot requirement: "Nothing in this section shall prohibit a city, county, or city and county from adopting ordinances or policies that further restrict the location or establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider." (§ 11362.768, subd. (f).) Subdivision (g) further states: "Nothing in this section shall preempt local ordinances, adopted prior to January 1, 2011,

that regulate the location or establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider."[11]

By amending the MMPA in A.B. 2650 to provide express recognition of local authority to regulate the location or establishment of dispensaries, the Legislature is, as a matter of law, deemed to have been aware of and to have implicitly approved the holdings in *Naulls* and *Kruse* that cities need not enact laws to accommodate medical marijuana distribution facilities. (*Nelson v. Person Ford Co.* (2010) 186 Cal.App.4th 983, 1008.) The Legislature had the opportunity to limit or reverse these holdings, but it did not do so. A "failure to make changes in [a] given statute in a particular respect when the subject is before the Legislature, and changes are made in other respects is indicative of intention to leave the law unchanged in that respect." (*Kusior v. Silver* (1960) 54 Cal.2d 603, 618.)

Furthermore, the legislative history of A.B. 2650 supports the conclusion that the MMPA does not preempt local zoning ordinances in any way. As originally introduced, A.B. 2650 did not explicitly address its effect upon local land use ordinances. (Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Apr. 8, 2010, RJN, Ex. C.) Almost immediately, concerns were expressed that the bill might unduly restrict local regulatory authority. The very first Assembly committee report noted that "[s]ince the passage of SB 420 in 2003, much of the medical marijuana regulation has been determined by local jurisdictions better equipped to resolve issues related to the unique nature of its city or county," and medical marijuana advocates complained that "[t]his legislation usurps the authority of local governments to make their own land-use decisions." (Assem. Pub. Saf. Comm., analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Apr. 8 and Apr. 15 2010, RJN, Exs. D, E.)

[11] Auburn's zoning regulation on dispensaries, section 159.019 of its Municipal Code, was enacted in 2006. (CT 4, 127.)

The Bill's author responded by clarifying that the preemptive intent of A.B. 2650 was limited, *i.e.*, to "provide[] local jurisdictions necessary guidance while allowing them to construct a more restrictive ordinance." (Assem. Comm. on Appropriations, analysis of Assem. Bill. No. 2650 (2009-2010 Reg. Sess.) as amended Apr. 15, 2010, RJN, Ex. F.) This intent was subsequently incorporated into two savings clauses, Subdivisions (f) and (g) of proposed Section 11362.768, which remained in A.B. 2650 as adopted. These provisions effectively favor restrictive local regulations, by allowing local governments "to construct a more restrictive ordinance" at any time, but "set[ting] a January 1, 2011 deadline for adopting any local ordinance that is less restrictive than AB 2650." (Sen. Loc. Gov. Comm, analysis of Assem. Bill. No. 2650 (2009-2010 Reg. Sess.) as amended Jun. 10, 2010, RJN, Ex. G.)

This limited preemption of local regulatory authority was the subject of intensive debate. Subsequent committee reports provided detailed discussions of the local police power, and repeatedly questioned whether any state interference with that plenary authority in this area was warranted. (*Ibid.*; Sen. Pub. Saf. Comm., analysis of Assem. Bill. No. 2650 (2009-2010 Reg. Sess.) as amended Jun. 10, 2010, RJN, Ex. H.) Notably, at no time during the legislative process was it ever suggested – by any participant – that the existing provisions of the MMPA preempt local authority to regulate marijuana-related land uses. Quite the contrary, the legislative committee reports repeatedly stressed the breadth of the local police power in this area and the desirability of minimizing state interference. (*See, e.g.*, RJN, Ex. G.)

Perhaps more importantly, the Legislature acted on this understanding, carefully crafting the provisions of A.B. 2650 to preserve local authority to construct more restrictive ordinances. These efforts would, of course, have been pointless – and the savings clauses surplusage – if, as suggested by appellants, the MMPA already preempted all more restrictive local regulations upon marijuana-related land uses. The Legislature clearly viewed A.B. 2650 as

its first tentative foray into the regulation of marijuana as a land use, which is utterly inconsistent with appellants' assertions that the MMPA broadly preempts local efforts to regulate such uses. The Legislature's careful preservation of local authority in this area, made in full awareness of existing local regulatory practices – and of the *Naulls* and *Kruse* decisions upholding these practices – bolsters *Kruse*'s conclusion that no such preemption exists. (*Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (2010) 187 Cal.App.4th 808, 827; *Board of Trustees of California State University v. Public Employment Relations Bd.* (2007) 155 Cal.App.4th 866, 877-878.)

A.B. 2650's legislative history also teaches a more subtle lesson. As *Ross v. Raging Wire Telecommunications, Inc., supra*, 42 Cal.4th at p. 931 noted in an analogous context, "given the controversy that would inevitably have attended" a proposal to restrict local authority over marijuana-related land uses, "we do not believe that [the MMPA] can reasonably be understood as adopting such a requirement silently and without debate."[12] The debate over A.B. 2650 proves the truth of this observation. Unlike the original MMPA, A.B. 2650 actually did address local land use authority, and was consequently subject to intensive scrutiny. This led to deliberate tailoring of A.B. 2650's savings clauses to achieve precisely the limited effect that the Legislature desired. One can scarcely imagine a clearer contrast with the legislative proceedings leading up to adoption of the original MMPA, which did not even mention either land use or the local police power.

[12] As the Supreme Court has said in other, similar contexts, "the drafters of legislation do not, one might say, hide elephants in mouseholes." (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal. 4th 231, 260-261; *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal. 4th 1158, 1171.)

5. AB 1300 Did Not Limit Local Control Over Medical Marijuana Dispensaries And Strengthened The MMPA's Anti-Preemption Provision

The Legislature again revisited the MMPA with Assembly Bill 1300 (Stats. 2011, ch. 196; hereinafter "A.B. 1300"), which followed the Court of Appeal decision in *Hill*. Rather than limit the holdings in *Naulls*, *Kruse*, and *Hill*, AB 1300 acknowledged those decisions and *strengthened* the MMPA's anti-preemption provision (§11362.83), 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 this article.

The motivation behind the bill, and its intended effect, were forcefully stated early in the legislative proceedings:

> Under article XI, section 7 of the California Constitution, 'A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.' Yet some argue that the Proposition 215 of 1996 and the MMP constitute the parameters of medical marijuana cooperative or collective regulation and, therefore, preclude local governments from enforcing any additional requirements. In the wake of key court cases on point, this bill clarifies state law so that communities may adopt ordinances and enforce them without the instability and expense of lawsuits challenging legal issues that have already been resolved. This

provision of the bill is written to be consistent with our state constitution and three appellate court decisions: (1) *City of Claremont v. Darrell Kruse*, which found that there is nothing in the text or history of Proposition 215 suggesting that the voters intended to mandate municipalities to allow medical marijuana dispensaries to operate within their jurisdictions, or to alter the fact that land use has historically been a function of local government under their grant of police power. (2) *City of Corona v. Ronald Naulls*, which found that a dispensary's failure to comply with the city's procedural requirements before opening and operating a medical marijuana dispensary could be prosecuted as a nuisance. (3) *County of Los Angeles v. Martin Hill*, which found the MMP does not confer on qualified patients and their caregivers the unfettered right to cultivate or dispense marijuana anywhere they choose, and that dispensaries are not similarly situated to pharmacies and, therefore, do not need to be treated equally under local zoning laws. (Assem. Pub. Saf. Comm., revised analysis of Assem. Bill. No. 1300 (2010-2011 Reg. Sess.) as amended Mar. 31, 2011, RJN, Ex. I.)

The understanding that A.B. 1300 would affirm the reasoning and results of *Kruse* and *Hill* was commonly shared throughout the legislative process. This intention was reiterated in Background Information Forms submitted to the Assembly Health Committee (RJN, Ex. J) and the Senate Committee on Public Safety (RJN, Ex. K). Further, the Senate Public Safety Committee analysis (RJN, Ex. L) contains a lengthy discussion of the facts, reasoning, and holding of *Kruse*, concluding that "[a]rguably, [A.B. 1300] simply restates long-standing law on the power of local entities to adopt ordinances that protect public safety, health and welfare." (RJN, Exs. I, M.)

The judicial presumption that the Legislature was aware of *Kruse* and *Hill* and approved those decisions (*Nelson v. Person Ford Co.*, *supra*, 186 Cal.App.4th at p. 1008.) is no longer merely a presumption. A.B. 1300 and its history make it perfectly apparent that *Kruse* and *Hill* actually got it right – and that the MMPA does not, and never did, prevent local governments from regulating marijuana-related land uses to the same extent as any other non-criminal activity or land use.

6. Appellants' Interpretation of A.B. 2650 and A.B. 1300 Is Incorrect

In interpreting the plain language of A.B. 2650 and A.B. 1300, appellants yet again try to manufacture ambiguity where none exists. (AOB 17-21.) Appellants argue that the absence of any express authorization for local prohibitions and the Legislature's use of the words "regulate" and "restrict" instead of "prohibit" and "ban" meant that the Legislature did not intend to allow *per se* prohibitions of medical marijuana dispensaries. Appellants' argument misses the point.

To begin with, there was no need for an express authorization of a local zoning prohibition. In the absence of any state law preemption, as set forth in *Kruse* and *Hill*, a local government can exercise its complete constitutional zoning authority to prohibit any land use, including medical marijuana dispensaries. In general, the power to regulate or restrict includes the power to prohibit. (*Leyva v. Superior Court* (1985) 164 Cal.App.3d 462, 473.) There are many examples of land uses or activities that, although lawful in general, are subject to municipal prohibition. (*See, e.g., Wal-Mart Stores, Inc. v. City of Turlock* (2006) 138 Cal.App.4th 273, 299-303 [upholding zoning prohibition of discount superstores]; *Nordyke v. King* (2002) 27 Cal.4th 875, 883-884 [holding that state law does not require cities to allow gun shows even though state law exempts such shows from criminal sanctions]; *Personal Watercraft Coalition v.*

Board of Supervisors (2002) 100 Cal.App.4th 129, 150 [upholding local ban on personal watercraft].)

There is nothing to suggest that the result should be any different with medical marijuana. Section 11362.768(f) states that local governments may "further restrict the location or establishment of a medical marijuana . . . dispensary." Similarly, section 11362.83 as amended in A.B. 1300 provides that local government may adopt ordinances that "regulate" the location, operation, and establishment of medical marijuana dispensaries. In drafting these provisions, the Legislature did not establish an outer limit on permissible local regulations. Rather, the Legislature drafted them broadly in such a way that recognizes local government's traditional constitutional zoning authority, which includes the power to prohibit certain land use activities in the interests of public welfare and safety. There is no language in A.B. 2650 or A.B. 1300 that would indicate a legislative intent to limit local government's constitutional police power. In contrast to the carefully-crafted, narrowly-drawn criminal immunities set forth in the original MMPA, the Legislature drafted these subsequent amendments regarding local zoning authority with broad, open-ended terminology and in a manner that is entirely consistent with the constitutional tradition of local control over land use.

Furthermore, both A.B. 2650 and A.B. 1300 recognize local authority to regulate or restrict the "establishment" of medical marijuana dispensaries. The word "establishment" includes the act of bringing something "into existence." (Webster's New Collegiate Dict. (1981) p. 388.) The ability to regulate or restrict the establishment of a medical marijuana dispensary would, therefore, include the ability to regulate or restrict whether that dispensary exists in the first place. Indeed, the inclusion of the word "establishment" would be superfluous if it did not mean that counties and cities could ban medical marijuana dispensaries in the first instance. A.B. 2650 expressly authorizes local laws that further restrict the "location *or* establishment" of a medical

marijuana facility. (Emphasis added.) A.B. 1300 permits local ordinances that "regulate the location, operation, *or* establishment of a medical marijuana cooperative or collective." (Emphasis added.) The use of the words "location" and "operation" already encompass basic time, place, and manner limitations. The word "establishment" would be mere surplusage if it did not permit counties and cities to control whether dispensaries were allowed in the first place.

D. Appellant's Argument That State Law Preempts Local Zoning Prohibitions Would Have Disastrous Public Policy Results.

Appellants' preemption argument fails in light of the plain language of the CUA and MMPA. As noted above, the immunities provided in the CUA and MMPA are very specific and limited to state criminal sanctions only. There is no clear indication of preemptive intent in the CUA and MMPA, or their respective legislative histories, with regard to local zoning ordinances. In addition, appellants' preemption argument fails because it would lead to absurd results that would have disastrous public policy consequences.

In interpreting a statute, courts "begin with the words of a statute and give these words their ordinary meaning." (*Hoechst Celanese Corp. v. Franchise Tax Bd.* (2001) 25 Cal.4th 508, 519.) "If the statutory language is clear and unambiguous, then we need go no further." (*Ibid.*) A court will consider "extrinsic aids" in interpreting a statute only if there is more than one reasonable construction. (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1008.) Using these extrinsic aids, we "select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." (*People v. Jenkins* (1995) 10 Cal.4th 234, 246.)

Here, the language of the CUA and MMPA is clear and unambiguous that there is no preemption of local zoning ordinances and that local governments retain their constitutional police power to determine whether or not to allow marijuana distribution facilities. In any event, appellants' contrary interpretation must fail because it would lead to an absurd result for local governments. Under appellants' interpretation, local governments can regulate or restrict the establishment of medical marijuana dispensaries, but they cannot prohibit such activities *per se*. That interpretation, however, creates the odd proposition that, despite the absence of any express statutory language, the MMPA compels every county and city in California, regardless of size and character, to allow a land use that is illegal under federal law. In appellants' view, even small residential communities, including purely residential cities, would have to enact laws accommodating medical marijuana dispensaries. For good reason, *Kruse* reached the exact opposite conclusion: "[n]either the CUA nor the MMPA compels the establishment of local regulations to accommodate medical marijuana dispensaries." (*City of Claremont v. Kruse, supra*, 177 Cal.App.4th at p. 1176.)

Appellants' argument would make medical marijuana distribution unique among all land uses in the state. Local governments would have to accommodate medical marijuana dispensaries despite the fact that dispensing medical marijuana is illegal. As noted above, courts have recognized the unique nature of medical marijuana distribution and its potentially dangerous secondary effects on a community. (*See, County of Los Angeles v. Hill, supra*, 192 Cal.App.4th at p. 871 [observing that medical marijuana dispensaries and pharmacies are not similarly situated for public health and safety purposes].) In *Hill*, the Court of Appeal accepted evidence "that the presence of large amounts of cash and marijuana make MMD's, their employees and qualified patients 'the target of a disproportionate amount of violent crime' including robberies and burglaries." (*Ibid.*) The *Hill* Court further noted that medical marijuana

dispensaries created risks of illegal resale of marijuana and affected the quality of life of the surrounding neighborhood by attracting loitering and marijuana smoking. (*Id.* at pp. 871-872.) The Auburn City Council made similar finding about the negative secondary effects of medical marijuana dispensaries when it adopted its zoning prohibition. (MJN, Ex. A at pp. 1, 6-8, 11-12, 20-21.) Even appellants acknowledged the inherent dangers in operating a medical marijuana dispensary by covering their storefront windows with black paper and installing extraordinary security measures such as outdoor security cameras. (CT 138, 172.) Despite these security issues, appellants ask this Court to hold that all counties and cities must allow medical marijuana dispensaries.

We are not aware of any other illegal activity that enjoys such protected status. Indeed, appellants' argument would necessarily elevate medical marijuana distribution above countless other legal activities, for which counties and cities retain their constitutional police power to prohibit in the interest of public welfare and safety. It is not surprising, therefore, that the Legislature drafted the MMPA's immunities in narrow terms and did not limit local zoning authority.

Appellants' argument also is suspect because it leaves significant questions unanswered. Where would the boundary be between a permissible medical marijuana regulation and impermissible ban? Must local governments allow "reasonable" opportunities for medical marijuana dispensaries to operate? Would counties and cities have to treat medical marijuana dispensaries in the same manner as adult businesses? Neither the CUA, the MMPA, nor appellants provide any guidance on these issues. Appellants' argument that counties and cities lack the basic police power to prohibit a land use that may not be appropriate for a particular community would create a void in the law, which would likely lead to further litigation for counties and cities that can ill afford it.

Finally, the notion that the Legislature has implicitly required every county and city in the State to allow medical marijuana dispensaries is even

more outrageous in light of the federal government's recent crackdown against medical marijuana dispensaries. On October 7, 2011, the four United States Attorneys in California announced a coordinated enforcement strategy "targeting the illegal operations of the commercial marijuana industry." (RJN, Ex. N.) The new enforcement strategy included both criminal prosecutions against marijuana distributors and civil forfeiture actions against property owners and was designed to "address a marijuana industry in California that has swelled to include numerous drug-trafficking enterprises that operate commercial grow operations, intricate distribution systems and hundreds of marijuana stores across the state – even though the federal Controlled Substances Act prohibits the sale and distribution of marijuana." (RJN, Ex. N.) Federal prosecutors in other states are also taking an aggressive approach toward medical marijuana operators, even when those operators comply with state laws. (RJN, Exs. O, P, Q.) There is uncertainty about whether such enforcement efforts would also target local officials involved in issuing permits for medical marijuana dispensaries, but federal prosecutors have raised the possibility of local officials' criminal liability. On April 14, 2011, the United States Attorneys in the State of Washington sent a letter to the Governor of Washington stating that "state employees who conducted activities mandated by the Washington legislative proposal [which would establish a licensing scheme for marijuana growers and dispensaries] would not be immune from liability under the CSA." (RJN, Ex. O.) In the face of such an aggressive and unambiguous enforcement effort, the argument that local governments must accommodate and allow medical marijuana dispensaries represents the height of absurdity.

IV. CONCLUSION

It is vital for local governments to have control within their jurisdictions over the use of land to distribute medical marijuana – an illegal controlled substance. Local officials are in the best position to evaluate their communities'

needs and ability to accommodate a land use that presents unique law enforcement and public safety concerns. Appellants' argument that local governments cannot prohibit medical marijuana dispensaries would undermine the longstanding and deeply-rooted tradition of local control over land use decisions. The League and CSAC, therefore, respectfully request that this Court affirm the trial court's decision to enjoin appellants' marijuana distribution activities, which violated the City of Auburn's carefully-considered zoning regulations.

Dated: June 19, 2012

Respectfully submitted,

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By: Stephen A. McEwen

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COUNTIES

CERTIFICATION OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.204(c)(1)

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the word count feature in my Microsoft Word software, this brief contains 12,762 words.

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

Executed this 19 day of June, 2012 in Santa Ana, California.

Respectfully submitted,

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PROOF OF SERVICE

I declare that I am over the age of eighteen (18) and not a party to this action. My business address is 1851 East First Street, Suite 1550, Santa Ana, California 92705.

On **June 19, 2012**, I served the following document(s):

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND PROPOSED *AMICI CURIAE* BRIEF IN SUPPORT OF PLAINTIFF AND RESPONDENT CITY OF AUBURN

on the interested parties in this action by placing a true and correct copy of such document, enclosed in a sealed envelope, addressed as follows:

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Executed **June 19, 2012**, Irvine, California.

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

Fran Kosky

FRAN KOSKY

SERVICE LIST

City of Auburn v. Sierra Patient and Caregiver Exchange, Inc., et al.

Court of Appeal, Third Appellate District Case No. C069622

[Superior Court Case No. S-CV-29599]

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